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Dockets: T-669-19
T-670-19

Citation: 2022 FC 1168

Ottawa, Ontario, August 10, 2022

PRESENT: The Honourable Mr. Justice Simon Noël

Docket: T-669-19

IN THE MATTER OF THE *SECURE AIR TRAVEL ACT*

BETWEEN:

BHAGAT SINGH BRAR

Appellant

and

CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Respondent

Docket: T-670-19

AND BETWEEN:

PARVKAR SINGH DULAI

Appellant

and

CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Respondent

JUDGMENT AND REASONS

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I. Overview

[1] These appeals are composed of a multi-pronged case in which the Appellants' claims that pertain to questions relating to sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and their claims relating to the reasonableness of a Minister's decision are being addressed in separate decisions. More specifically, two decisions – *Brar v Canada (Minister of Public Safety and Emergency Preparedness) 2022 FC 1163* [*Brar 2022*] and *Dulai v Canada (Minister of Public Safety and Emergency Preparedness*) *2022 FC 1164* [*Dulai 2022*] – deal with the reasonableness of the Minister's decision and are being issued concurrently [the Reasonableness Decisions]. The Reasonableness Decisions include a confidential set of reasons. The present Judgment and Reasons [the Decision] address constitutional issues raised in both appeals.

[2] These are the first appeals filed pursuant to the *Secure Air Travel Act*, SC 2015, c 20, s 11 [SATA] since its enactment in 2015. The parties to these appeal proceedings have contested parts of the legislation which therefore requires that the Court examine and provide clarity and guidance where deemed necessary.

[3] The Decision considers whether sections 8 and 9(1)(a) of the SATA infringe the Appellants' mobility rights protected by section 6 of the *Charter*, and whether sections 15 and 16 of the SATA violate the Appellants' rights under section 7 of the *Charter*, specifically their rights to liberty and security of the person, on the basis that the impugned provisions of the

SATA permit the Minister, and the Court, to determine the reasonableness of 1) the Appellants' designation as listed persons under the SATA, and 2) the Minister's decision to list the Appellants, based on information that is not disclosed to them and to which they have no opportunity to respond.

[4] The Appellants remain listed individuals pursuant to section 8 of the SATA given the Minister's decision to deny their applications for administrative recourse under section 15 of the SATA, which sought to have their names removed from the "no-fly" list. The Minister made the decision after determining that he had reasonable grounds to suspect that the Appellants would either "engage or attempt to engage in an act that would threaten transportation security" or "travel by air for the purpose of committing an act or omission" that:

(i) is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code*, RSC 1985, c C 46 [*Criminal Code*] or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that Act, or

(ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i) (see paragraphs 8(1)(a) and 8(1)(b) of the SATA).

Although I conclude in the Reasonableness Decisions that the Minister's determinations pursuant to paragraph 8(1)(a) of the SATA are unreasonable given the lack of supporting evidence, the Appellants' listing on the no-fly list of the SATA is nevertheless reasonable pursuant to paragraph 8(1)(b) of the SATA (see *Brar 2022* and *Dulai 2022*).

[5] The tension between individual rights and collective interests in security was discussed at length in two related prior decisions published in October 2021 (*Brar v Canada (Minister of Public Safety and Emergency Preparedness)* 2021 FC 932 [*Brar 2021*] and *Dulai v Canada (Public Safety and Emergency Preparedness)* 2021 FC 933 [*Dulai 2021*]).

[6] In those decisions, I considered whether disclosing the redacted information and other evidence adduced during *ex parte* and *in camera* hearings would be injurious to national security or endanger the safety of any person. Upon finding in the affirmative with respect to certain information, I then asked if the protected information and other evidence could be disclosed to the Appellants in the form of a summary or otherwise in a way that would not jeopardize national security or endanger the safety of any person. The outcome of those decisions was that some redactions were confirmed by the Court, some were fully or partially lifted, and the information underneath other redactions was summarized. The delicate balance between protecting sensitive information and the right of the person to know the case against them is not uncommon in national security matters, as demonstrated by *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui I*]:

> [55] Confidentiality is a constant preoccupation of the certificate scheme. The judge "shall ensure" the confidentiality of the information on which the certificate is based and of any other evidence if, in the opinion of the judge, disclosure would be injurious to national security or to the safety of any person: s. 78(b). At the request of either minister "at any time during the proceedings", the judge "shall hear" information or evidence in the absence of the named person and his or her counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person: s. 78(e). The judge "shall provide" the named person with a summary of information that enables him or her to be reasonably informed of the circumstances giving rise to the certificate, but the summary cannot include

> anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person: s. 78(h). Ultimately, the judge may have to consider information that is not included in the summary: s. 78(g). In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.
>
> [58] More particularly, the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual. In *Chiarelli*, this Court found that the Security Intelligence Review Committee (SIRC) could, in investigating certificates under the former Immigration Act, 1976, S.C. 1976-77, c. 52 (later R.S.C. 1985, c. I-2), refuse to disclose details of investigation techniques and police sources. The context for elucidating the principles of fundamental justice in that case included the state's "interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources" (p. 744). In *Suresh*, this Court held that a refugee facing the possibility of deportation to torture was entitled to disclosure of all the information on which the Minister was basing his or her decision, "[s]ubject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents" (para. 122). And, in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.), the Court upheld the section of the *Privacy Act*, R.S.C. 1985, c. P-21, that mandates in camera and ex parte proceedings where the government claims an exemption from disclosure on grounds of national security or maintenance of foreign confidences. The Court made clear that these societal concerns formed part of the relevant context for determining the scope of the applicable principles of fundamental justice (paras. 38-44).

The principles described above for *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] certificate's proceedings are applicable to the SATA (see *Brar v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729 [*Brar 2020*] at paras 92, 95, 100, 105, etc.).

[7] For the following reasons, the appeal as it relates to the breaches of the Appellants' constitutional rights is dismissed.

II. National security

[8] The role of the Canadian Government to ensure security in air transportation is essential. As part of Canada's societal commitment, it is a top priority to guarantee that all Canadians live in a safe environment. In addition to its domestic responsibility to maintain community safety, the Canadian Government also has international responsibilities towards partner countries.

[9] Lesley Soper, a witness in these appeals, included in her affidavit a comment made on February 19, 2015, by the Parliamentary Secretary to the Minister of Citizenship and Immigration when speaking about Bill C-51 (that would later become the SATA) in the House of Commons:

> One of the gravest threats to global security is the phenomenon of terrorist travel: individuals who travel by air to regions of unrest and violence to engage in terrorist activities. These individuals do not pose an immediate threat to an airplane. Indeed, they want their flight to be safe and uneventful so that they can reach their destinations. While these violent extremists are not an immediate threat to an airplane or to passengers when they travel, they do pose a significant danger to those people living in the countries where they undergo their training and terrorist activities and in the countries in which they want to perpetrate their crimes. Moreover, there is a great risk that they will return to their home country to test out their newly acquired skills by plotting and carrying out attacks on innocent civilians. (Lesley Soper's supplementary affidavit, February 25, 2022 at para 18)

[10] The threat posed by individuals suspected of travelling abroad to engage in extremist activity (extremist travellers) is significant and presents difficult challenges to both Canada and its allies. According to Public Safety Canada's 2016 *Public Report on the Terrorist Threat to Canada*,

> [t]he principal terrorist threat to Canada remains that posed by violent extremists who could be inspired to carry out an attack in Canada. Violent extremist ideologies espoused by terrorist groups like Daesh and al-Qaida continue to appeal to certain individuals in Canada. As in recent years, the Government of Canada has continued to monitor and respond to the threat of extremist travelers, that is, individuals who are suspected of travelling abroad to engage in terrorism-related activity. The phenomenon of extremist travellers - including those abroad, those who return, and even those prevented from travelling - poses a range of security concerns for Canada. As of the end of 2015, the Government was aware of approximately 180 individuals with a nexus to Canada who were abroad and who were suspected of engaging in terrorism-related activities. The Government was also aware of a further 60 extremist travelers who had returned to Canada. (Lesley Soper's supplementary affidavit, February 25, 2022 at para 26)

[11] The Government relies on different tools to manage and mitigate this threat at home. For example, terrorism peace bonds entail courts imposing conditions on extremist travellers. The Government can also cancel, refuse or revoke passports when required. Since its adoption, Canada relies on the SATA to prevent travel to commit terrorism offences and threats to transportation security.

[12] Canada's security commitments extend well beyond its borders. It is common knowledge that Canada is a signatory to a number of international treaties and agreements, which enables strong collaboration with international partners like the Five Eyes, the G7, the European Union, Interpol, and the United Nations. These alliances improve the sharing of information and best

practices, but also call upon member states to do their part to ensure global security. In Canada, this responsibility has led to the adoption of a legislative framework that governs the provision of this security. In *Charkaoui I*, former Chief Justice McLachlin highlighted the inherent challenge in developing such a legislative framework:

> [1] One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

[13] Indeed, a democratic government faces a perpetual challenge when establishing systems to ensure collective security because necessary measures to fulfil this goal must accord with the Constitution and the rights and liberties it guarantees. As part of this effort, the Government must safeguard national security information and intelligence when developing security systems such as the SATA. In this regard, the SATA is not the only legislation that seeks to safeguard sensitive information. For example, the *Canada Evidence Act*, RSC, 1985, c C-5 at section 38, the IRPA at section 83, the *Access to Information Act*, RSC, 1985, c A-1 at section 16, the *Privacy Act*, RSC, 1985, c P-21 at sections 69 and 70, and the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 at subparagraphs 7(3)(c.1)(i) and (c.2)(ii) are some of the statutes that have similar legislative provisions to protect sensitive information.

[14] Case law consistently holds that national security information and intelligence ought to be protected and can only be disclosed in summaries that do not reveal any information injurious to national security or that could endanger the safety of any person.

III. Summary of the facts

A. *Facts in Mr. Brar's Appeal*

[15] On April 23, 2018, Mr. Brar's name was included on the no-fly list. Pursuant to the SATA, the Minister concluded that there were reasonable grounds to suspect that he would (1) engage or attempt to engage in an act that would threaten transportation security, and/or (2) travel by air for the purpose of committing an act or omission that is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code*, or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that Act.

[16] The following day, Mr. Brar attempted twice to take flights that would eventually have transported him from Vancouver to Toronto, but each time a written Denial of Boarding under the Passenger Protect Program [PPP] was issued pursuant to direction under paragraph 9(1)(a) of the SATA. This resulted in both WestJet and Air Canada denying Mr. Brar boarding at the Vancouver International Airport on that day.

[17] On June 2, 2018, Mr. Brar submitted an application for administrative recourse to the Passenger Protect Inquiries Office [the PPIO] that sought the removal of his name from the SATA list pursuant to section 15 of the SATA. In response, the PPIO provided him with a two-

page unclassified summary of the information supporting the decision to place his name on the SATA list. The PPIO further advised that the Minister would consider additional classified information when assessing his application under section 15 of the SATA. Pursuant to subsection 15(4) of the SATA, Mr. Brar was provided with the opportunity to make written representations in response to the unclassified information disclosed to him, which he submitted to the PPIO on December 3, 2018.

[18] On December 21, 2018, the Minister advised Mr. Brar of his decision to maintain his status as a listed person under the SATA. Following a review of the classified and unclassified information provided, including Mr. Brar's written submissions, the Minister's delegate "concluded that there [were] reasonable grounds to suspect that [Mr. Brar would] engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences."

[19] On April 18, 2019, Mr. Brar filed a Notice of Appeal with this Court pursuant to subsection 16(2) of the SATA. In his Notice of Appeal, Mr. Brar asks this Court to order the removal of his name from the SATA list pursuant to subsection 16(5) of the SATA, or to order the remittance of the matter back to the Minister for redetermination. Mr. Brar also asks this Court to declare that sections 8, 15, 16 and paragraph 9(1)(a) of the SATA are unconstitutional and are therefore of no force and effect, or to read-in such procedural safeguards that would cure any constitutional deficiencies in the SATA.

[20] More specifically, Mr. Brar lists the following as the grounds of his appeal in his Notice: the Minister's decision was unreasonable; and, the procedures set out in the SATA violate his common law rights to procedural fairness seeing as the SATA deprives him of his right to know the case against him and the right to answer that case. Mr. Brar also requested the disclosure of all material related to his application for recourse, all material related to the Minister's decision to designate him as a listed person, all material before the Minister's delegate on the application for recourse, and all other materials relating to the Minister's delegate decision to confirm his status as a listed person under the SATA.

B. *Facts in Mr. Dulai's Appeal*

[21] On March 29, 2018, Mr. Dulai's name was included on the no-fly list. It was concluded that there were reasonable grounds to suspect that he would (1) engage or attempt to engage in an act that would threaten transportation security, and/or (2) travel by air for the purpose of committing an act or omission that is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code*, or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that Act.

[22] On May 17, 2018, Mr. Dulai was issued a written Denial of Boarding under the PPP preventing him from boarding a flight at the Vancouver International Airport pursuant to a direction under paragraph 9(1)(a) of the SATA. Mr. Dulai was scheduled to travel from Vancouver to Toronto.

[23] On June 8, 2018, the PPIO received Mr. Dulai's application for administrative recourse in which he sought the removal of his name from the SATA list, pursuant to section 15 of the SATA. In response, the PPIO provided him with a two-page unclassified summary of the information supporting the decision to place his name on the SATA list. The PPIO further advised that the Minister would consider additional classified information when assessing his application under section 15 of the SATA. Pursuant to subsection 15(4) of the SATA, Mr. Dulai was provided with the opportunity to make written representations in response to the unclassified information disclosed to him, which he submitted to the PPIO.

[24] On January 30, 2019, the Minister advised Mr. Dulai of his decision to maintain his listed status under the SATA. Following a review of the classified and unclassified information provided, including Mr. Dulai's written submissions, the Minister's delegate "concluded that there [were] reasonable grounds to suspect that [Mr. Dulai would] engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences."

[25] On April 18, 2019, Mr. Dulai filed a Notice of Appeal with this Court pursuant to subsection 16(2) of the SATA. Mr. Dulai asks this Court to order the removal of his name from the SATA list pursuant to subsection 16(5) of the SATA, or to order the remittance of the matter back to the Minister for redetermination. Mr. Dulai also asks this Court to declare that sections 8, 15 and 16, as well as paragraph 9(1)(a) of the SATA are unconstitutional and therefore of no force and effect, or to read-in such procedural safeguards that would cure any constitutional deficiencies in the SATA.

[26] More specifically, Mr. Dulai enumerates the following grounds of appeal: that the Minister's decision was unreasonable and that the procedures set out in the SATA violate his common law rights to procedural fairness seeing as the SATA deprives him of his right to know the case against him and the right to answer that case. Mr. Dulai also requested the disclosure of all material related to his application for recourse, all material related to the Minister's decision to designate him as a listed person, all material before the Minister on the application for recourse, and all other material relating to the Minister's decision to confirm his status as a listed person under the SATA.

C. *Procedural history covering both Appeals (Mr. Brar and Mr. Dulai)*

[27] Since these appeals have been initiated, several documents have been exchanged, case management conferences both public and *ex parte* have been held, public and *ex parte* hearings took place in both Ottawa and Vancouver, and decisions applicable to each case were published (*Brar 2020*, *Brar 2021* and *Dulai 2021*).

[28] As mentioned in the Reasonableness Decisions, navigating the SATA legislation has been laborious, lengthy, and complex. It required that the Appellants, counsel, *amici curiae* [*Amici*] and this Court think about and test many areas of the law. Due to its length, the complete judicial history of these two appeals is available at Annex A. It includes information on every step made over the last three years and reflects both parties' dedication to these matters, and the great level of detail with which each step was handled.

IV. Review and analysis of the SATA

A. *General*

[29] In order to analyze the questions in this matter, it is essential to undertake a review of the SATA first. An understanding of its legislative object, its operation, and its appeal mechanism is the compass that will be necessary to navigate these uncharted waters. This section addresses: (1) the context and legislative object of the SATA; (2) the operation of the SATA*;* and (3) the appeal provisions of the SATA. This methodology is in accordance with the modern approach to statutory interpretation endorsed by the Supreme Court of Canada (SCC) and will allow the reader to have a better understanding of what the designated judge is asked to do when an appeal is initiated under the SATA. It will also help contextualize the mandate of the *Amici*. For the purposes of this section, I have relied, for the most part, on the *Brar 2020* decision at paragraphs 60-88, with some adjustments.

[30] The SCC has repeatedly endorsed the following concise summary of the law on statutory interpretation provided in *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 [*Rizzo*]:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary

> sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[31] The SATA's general object of balancing individual rights and freedoms with Canada's national security interests in air travel is evident when one analyzes the title of the Act, the summary and preamble of its enacting and amending omnibus legislation, the legal context at the time of its enactment, and the pertinent legislative debates in both chambers of Parliament.

[32] After nearly a decade of operating the PPP (better known as the "no-fly list") via the *Aeronautics Act*, RSC 1985, c A-2, Parliament sought to create a specific legislative regime for the operation of this program (Lesley Soper's first affidavit at para 5). Accordingly, the *Anti-Terrorism Act, 2015*, SC 2015, c 20, introduced as an omnibus bill, significantly amended and restructured national security law in Canada and created the SATA in 2015. A few years later, the 42nd Parliament of Canada enacted the *National Security Act, 2017*, SC 2019, c 13, which received royal assent on June 21, 2019. Once again, this legislation—also introduced as an omnibus bill—redrew the legal landscape regarding national security in Canada and amended an array of laws, including the SATA.

[33] The SATA's objective of protecting Canada's national security interests and the safety of Canadians in relation to air travel is evidenced in its short title, "Secure Air Travel Act", as well as its legislative title, "An Act to enhance security relating to transportation and to prevent air travel for the purpose of engaging in acts of terrorism." Moreover, the summary of the *Anti-Terrorism Act, 2015* confirms this object, noting the following:

Anti-terrorism Act, 2015, SC 2015, c 20

Part 2 enacts the *Secure Air Travel Act* in order to provide a new legislative framework for identifying and responding to persons who may engage in an act that poses a threat to transportation security or who may travel by air for the purpose of committing a terrorism offence. That Act authorizes the Minister of Public Safety and Emergency Preparedness to establish a list of such persons and to direct air carriers to take a specific action to prevent the commission of such acts. In addition, that Act establishes powers and prohibitions governing the collection, use and disclosure of information in support of its administration and enforcement. That Act includes an administrative recourse process for listed persons who have been denied transportation in accordance with a direction from the Minister of Public Safety and Emergency Preparedness and provides appeal procedures for persons affected by any decision or action taken under that Act. That Act also specifies punishment for contraventions of listed provisions and authorizes the Minister of Transport to conduct inspections and issue compliance orders. Finally, this Part makes consequential amendments to the

Loi antiterroriste (2015), LC 2015, ch 20

La partie 2 édicte la *Loi sur la sûreté des déplacements aériens* qui constitue un nouveau cadre législatif en vue de l'identification des personnes qui pourraient participer à un acte qui menacerait la sûreté des transports ou qui pourraient se déplacer en aéronef dans le but de commettre une infraction de terrorisme et en vue de l'intervention à leur égard. Le ministre de la Sécurité publique et de la Protection civile est autorisé à établir une liste de telles personnes et à enjoindre aux transporteurs aériens de prendre la mesure qu'il précise pour prévenir la commission de tels actes. Cette loi établit aussi les pouvoirs et les interdictions régissant la collecte, l'utilisation et la communication de renseignements afin d'assister le ministre de la Sécurité publique et de la Protection civile dans son application et son exécution. Elle prévoit un processus de recours administratif pour les personnes inscrites qui ont fait l'objet d'un refus de transport au titre d'une directive du ministre de la Sécurité publique et de la Protection civile ainsi qu'un processus d'appel pour les personnes touchées par une décision ou une mesure prise au titre de

Aeronautics Act and the *Canada Evidence Act*.	cette loi. Celle-ci prévoit en outre les peines pour les infractions aux dispositions énumérées et autorise le ministre des Transports à mener des inspections et à prendre des mesures d'exécution. De plus, elle modifie la *Loi sur l'aéronautique* et la *Loi sur la preuve au Canada* en conséquence.

[34] The overall purpose of the *National Security Act, 2017* was to address concerns expressed by the public and experts alike regarding a perceived failure of the *Anti-terrorism Act, 2015* to balance national security interests with individual rights and freedoms. This is reflected in its preamble, which stipulates the following:

Preamble	Préambule
Whereas a fundamental responsibility of the Government of Canada is to protect Canada's national security and the safety of Canadians;	Attendue : que la protection de la sécurité nationale et de la sécurité des Canadiens est l'une des responsabilités fondamentales du gouvernement du Canada;
Whereas that responsibility must be carried out in accordance with the rule of law and in a manner that safeguards the rights and freedoms of Canadians and that respects the *Canadian Charter of Rights and Fre*edoms;	que le gouvernement du Canada a l'obligation de s'acquitter de cette responsabilité dans le respect de la primauté du droit et d'une manière qui protège les droits et libertés des Canadiens et qui respecte la *Charte canadienne des droits et libertés*;
Whereas the Government of Canada is committed to enhancing Canada's national	que le gouvernement du Canada est résolu à consolider le cadre fédéral de sécurité

security framework in order to keep Canadians safe while safeguarding their rights and freedoms;

nationale dans le but d'assurer la sécurité des Canadiens tout en préservant leurs droits et libertés;

Whereas the Government of Canada, by carrying out its national security and information activities in a manner that respects rights and freedoms, encourages the international community to do the same;

que le gouvernement du Canada, du fait qu'il exerce les activités liées à la sécurité nationale et au renseignement d'une manière qui respecte les droits et libertés, encourage la communauté internationale à faire de même;

Whereas enhanced accountability and transparency are vital to ensuring public trust and confidence in Government of Canada institutions that carry out national security or intelligence activities;

que la confiance de la population envers les institutions fédérales chargées d'exercer des activités liées à la sécurité nationale ou au renseignement est tributaire du renforcement de la responsabilité et de la transparence dont doivent faire preuve ces institutions;

Whereas those institutions must always be vigilant in order to uphold public safety;

que ces institutions fédérales doivent constamment faire preuve de vigilance pour assurer la sécurité du public;

Whereas those institutions must have powers that will enable them to keep pace with evolving threats and must use those powers in a manner that respects the rights and freedoms of Canadians;

que ces institutions fédérales doivent en outre disposer de pouvoirs leur permettant de faire face aux menaces en constante évolution et exercer ces pouvoirs d'une manière qui respecte les droits et libertés des Canadiens;

Whereas many Canadians expressed concerns about provisions of the *Anti-terrorism Act, 2015*;

que nombre de Canadiens ont exprimé des préoccupations au sujet de dispositions de la *Loi antiterroriste de 2015*;

And whereas the Government of Canada engaged in comprehensive public

que le gouvernement du Canada a entrepris de vastes consultations publiques afin

consultations to obtain the views of Canadians on how to enhance Canada's national security framework and committed to introducing legislation to reflect the views and concerns expressed by Canadians;	de recueillir l'avis des Canadiens quant à la façon de consolider le cadre fédéral de sécurité nationale et qu'il s'est engagé à déposer un projet de loi qui tienne compte des préoccupations et des avis exprimés par les Canadiens,

[35] Read together, the long and the short title of the SATA, the summary of the *Anti-Terrorism Act, 2015* and the preamble of the *National Security Act, 2017* reveal the object of the SATA and how it fits into the overall legislative architecture of Canada's national security legislative scheme.

[36] The *Anti-Terrorism Act, 2015* demonstrates that the object of the SATA is to give the Minister the ability to identify, and respond to, persons that pose a threat to transportation security or may travel by air for the purpose of committing a terrorism offence. At the same time, it must ensure that affected persons are provided with both an administrative review and an appeal mechanism that must protect confidential information.

[37] The preamble of the *National Security Act, 2017* allows the reader to situate this intention within Parliament's overarching objective regarding national security: ensuring a careful balance between the rights and freedoms of individuals while protecting Canada's national security and the safety of Canadians.

[38] The legislative object of protecting Canada's national security interests and the safety of Canadians with regard to air travel, in a manner that carefully balances this objective with the

rights and freedoms of individuals, is consistent with the relevant jurisprudential context at the time of the enactment of the SATA. Indeed, in the context of certificate proceedings under the IRPA, the SCC made it clear that a careful balance must be achieved between the collective interest in protecting confidential information for national security reasons and the interest in protecting individual rights and freedoms (see *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 [*Harkat*] at paras 40-44 and *Charkaoui I* at para 1).

[39] *Harkat* and *Charkaoui I* were mentioned on numerous occasions by members of the legislature and witnesses before Parliament's two chambers when studying and debating the creation of the SATA in 2015, as well as during the amendment of the SATA between 2017 and 2019 (see *Debates of the Senate*, 41st Parl 2nd Sess, Vol 149 No 142 (14 May 2015) at 3388–3389 (Honourable Senator Claudette Tardif) and *House of Commons Standing Committee on Public Safety and National Security*, 42nd Parl, 1st Sess, No 90 (7 December 2017) at 12–13).

[40] In sum, this general object of balancing national security and the safety of Canadians with individual rights and freedoms is evident when one considers the SATA in its overall legislative context. Accordingly, when interpreting the legislative framework set out in the SATA, this general object must animate one's understanding of the statute's words (see *Rizzo* at para 21).

B. *Operation of the SATA*

[41] The provisions of the SATA outline the authority of the Minister to list individuals under the SATA, share information related to this list with domestic and foreign partners, and direct air

carriers to take the necessary measures to prevent persons from engaging or attempting to engage in an act that threatens aviation security or travel for the purpose of terrorism. The statute also provides for an internal administrative recourse mechanism for listed persons to have their names removed from the list, and if unsuccessful at that stage, a right of appeal to the Federal Court.

[42] The starting point of any statutory analysis of the SATA is section 8. This section provides for the establishment of a list by the Minister (or their delegate) of persons whom they have "reasonable grounds to suspect" will:

(a) engage or attempt to engage in an act that would threaten transportation security; or	a) soit participera ou tentera de participer à un acte qui menacerait la sûreté des transports;
(b) travel by air for the purpose of committing an act or omission that	b) soit se déplacera en aéronef dans le but de commettre un fait — acte ou omission — qui :
(i) is an offence under section 83.18, 83.19 or 83.2 of the *Criminal Code* or an offence referred to in paragraph (c) of the definition ***terrorism offence*** in section 2 of that Act, or	(i) constitue une infraction visée aux articles 83.18, 83.19 ou 83.2 du *Code criminel* ou à l'alinéa c) de la définition de ***infraction de terrorisme*** à l'article 2 de cette loi
(ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i).	(ii) s'il était commis au Canada, constituerait une des infractions mentionnées au sous-alinéa (i).

[43] The scope of this power to list persons at subsection 8(1) includes all persons, both inside and outside Canada (subsection 4(1)), and includes acts or omissions committed outside Canada

that would contravene to the *Criminal Code* if committed in Canada, which are considered for the purpose of the SATA as acts committed within Canada (section 5). The list includes the first, middle and surname, any known alias, the date of birth, and the gender of the listed persons (subsection 8(1)).

[44] The Minister (or their delegate) must review the list every 90 days to determine if the grounds on which a person was listed still exist (subsection 8(2)). It is possible to amend the list at any time in order to remove a name or to modify information relating to a listed person (subsection 8(3)). Section 20 prohibits the disclosure of the list or its contents other than in accordance with the exceptions stated in the SATA. In fact, a listed individual only becomes aware of their listing when they are denied transportation at an airport (see subsection 8(1) and paragraph 9(1)(a) of the SATA and Lesley Soper's first affidavit at para 20).

[45] Section 10 of the SATA provides that the Minister may collect information from, and disclose information to, the Minister of Transport, the Minister of Citizenship and Immigration, the Royal Canadian Mounted Police [RCMP], the Canadian Security Intelligence Service [CSIS], the Canada Border Services Agency [CBSA], and any other person or entity designated by regulations. The Minister may also share information obtained, or even the list itself, in whole or in part, with foreign states with which it holds written agreements, as well as receive information from these foreign states (sections 11 and 12).

[46] In practice, the members of the Passenger Protect Advisory Group (PPAG) chaired by Public Safety Canada provide information to the Minister's delegate in order to determine who is

placed on the SATA list. Each of the nominating members of the Advisory Group (Transport Canada, CSIS, RCMP, and CBSA) provide the full membership of the Advisory Group with a recommendation for listing, including a report providing information on an individual, as well as sufficient information to support their addition to the SATA list. The listing of the individual in question is then considered by the Advisory Group, which advises the Minister's delegate (usually a Senior Assistant Deputy Minister) on whether to ultimately list the individual pursuant to subsection 8(1) of the SATA. Review and updates of listings under subsection 8(2) are performed according to a similar procedure (Lesley Soper's first affidavit at paras 9-12).

[47] Air carriers are key to the operation of the SATA regime. Notably, the SATA requires that all accredited air carriers or reservation operators working out of Canada, or for flights coming to Canada, comply with the SATA and its regulations before allowing any person to board an aircraft or transporting any person (subsection 6(1)). This includes the requirement to provide information concerning the persons who are on board or expected to be on board an aircraft for any flight (subsection 6(2)).

[48] In practice, the SATA list is disclosed to Transport Canada pursuant to section 10 of the SATA. The department then discloses the list to air carriers and operators of aviation reservation systems pursuant to subsection 13(a) of the SATA.

[49] Subsection 9(1) of the SATA gives the Minister the power to direct an air carrier to "take a specific, reasonable and necessary action to prevent a listed person from engaging in any act set out in subsection 8(1)" as well as the power to "make directions respecting, in particular (a)

the denial of transportation to a person; or (b) the screening of a person before they enter a sterile area of an airport or board an aircraft" when a positive match arises. When a denial of transportation under paragraph 9(1)(a) is directed, the listed person is provided with a written notice to this effect. As stated earlier, a person first becomes aware of their listing when the written notice is issued. Barring a denial, a listed person is not informed of their listing.

[50] An individual who has been denied transportation pursuant to section 9 of the SATA can initiate an administrative recourse to have their name removed from the SATA list (subsection 15(1)). The individual can apply to the Minister in writing within 60 days of the denied transportation, although an extension may be granted pursuant to subsection 15(2). On receipt of the application, the Minister must decide whether there are still reasonable grounds to maintain the applicant's name on the list pursuant to subsection 15(4).

[51] In considering a listed person's application for administrative recourse, the nominating member of the Advisory Group will provide information to help the Minister determine whether reasonable grounds exist to maintain the person's name on the SATA list. The Minister will also provide the listed person with an opportunity to make representations that will be considered in the decision (subsection 15(3)).

[52] Section 15 of the SATA imposes no explicit obligation on the Minister to disclose any information to a listed person in order to assist them in making representations. However, in the cases at bar both Appellants received a two-page unclassified summary of the information that

was placed before the Minister along with a statement that the Minister would also consider classified information in his decision (Lesley Soper's first affidavit, Document ii of Exhibit B).

[53] Finally, once the Minister makes a decision on the listed individual's application for administrative recourse pursuant to subsection 15(4), the Minister must give notice to the listed individual without delay (subsection 15(5)). Pursuant to subsection 15(6), if the Minister does not make a decision within a period of 120 days after the day the application is received, the Minister is deemed to have decided to remove the individual's name from the list. The Minister may nevertheless extend this period by an additional 120 days, upon notice, if there is a lack of sufficient information available to make a decision.

C. *Appeal provisions of the SATA*

[54] Beyond the internal decision-making process and administrative recourse provisions in the SATA, the legislative scheme provides for an external appeal to the Chief Justice of the Federal Court, or a judge designated by the Chief Justice, pursuant to the appeal procedures set out in section 16 of the SATA. In particular, the SATA provides that a person listed pursuant to section 8 who has been denied transportation as a result of a direction made pursuant to section 9 may appeal a decision made under section 15 within 60 days of the notice of decision (see subsections 16(1) and 16(2)). Pursuant to paragraph 63(1)(e) of the *Federal Courts Rules*, SOR/98–106, the originating document to begin this process is a notice of appeal. In the present appeals, both Appellants submitted Notices of Appeal in accordance with the *Federal Court Rules* in April 2019.

[55] Subsection 16(4) tasks the designated judge with determining "whether the decision [of the Minister pursuant to section 15] is reasonable on the basis of the information available to the judge" and requires that this determination be done "without delay." If the decision is deemed unreasonable, subsection 16(5) allows the judge to order that an appellant's name be removed from the list. These subsections are key in defining the nature of the appeal under the SATA. Indeed, they set the standard applicable for the designated judge's review, do not limit the evidence before the judge to the evidence that was before the Minister, and allocate powers to the judge to make an immediate decision concerning the removal of an individual from the SATA list.

[56] To frame the appeal, subsection 16(6) of the SATA sets out numerous procedural provisions:

Procedure	Procédure
16(6) The following provisions apply to appeals under this section:	16(6) Les règles ci-après s'appliquent aux appels visés au présent article :
(a) at any time during a proceeding, the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;	a) à tout moment pendant l'instance et à la demande du ministre, le juge doit tenir une audience à *huis clos* et en l'absence de l'appelant et de son conseil dans le cas où la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(b) the judge must ensure the confidentiality of information and other evidence provided	b) il lui incombe de garantir la confidentialité des renseignements et autres

by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(c) throughout the proceeding, the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

c) il veille tout au long de l'instance à ce que soit fourni à l'appelant un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'appelant d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

(d) the judge must provide the appellant and the Minister with an opportunity to be heard;

d) il donne à l'appelant et au ministre la possibilité d'être entendus;

(e) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

e) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

(f) the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant;

f) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'appelant;

(g) if the judge determines that information or other evidence provided by the Minister is not relevant or if the Minister withdraws the

g) s'il décide que les renseignements et autres éléments de preuve que lui fournit le ministre ne sont pas pertinents ou si le ministre les

information or evidence, the judge must not base a decision on that information or other evidence and must return it to the Minister; and	retire, il ne peut fonder sa décision sur ces renseignements ou ces éléments de preuve et il est tenu de les remettre au ministre;
(h) the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.	h) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance.

[57] Finally, section 17 of the SATA confirms that section 16 of the SATA applies to any further appeal of the decision, with necessary modifications.

[58] An analysis of the SATA in its entirety reveals key measures in furthering the SATA's objective of protecting Canada's national security interests and the safety of Canadians in relation to air travel. Those key measures include the provisions, regulations, and practices relating to the listing of individuals, the prohibitions regarding disclosure of information, the strategic sharing of information with select partners, and the issuing and application of directions to deny transportation or to screen individuals. However, a simple reading of these measures, together with the actual methods in place, shows that the named individual is not involved in the SATA procedures until transportation is denied, if at all. Therefore, a holistic reading of the SATA suggests that this legislative scheme relies on the administrative recourse provisions at section 15 and the appeal provisions at section 16 to balance the SATA's objective of protecting national security interests with that of ensuring the protection of individual rights and freedoms. Because the administrative recourse provision at section 15 offers no explicit guarantee of disclosure, and a limited opportunity to make written submissions, a heavy burden is placed on

the appeal mechanism in section 16 of the *SATA* to give effect to the balance sought by the statute.

[59] Given the designated judge's broad discretion under section 16 of the SATA, they have an important responsibility to ensure the confidentiality of all sensitive information (para 16(6)(b)) as well as to ensure that the appellant is provided with summaries of sensitive information, where possible, so that they may be reasonably informed of the Minister's case and be provided an opportunity to be heard (paras 16(6)(c) and 16(6)(d)). This is a demanding function that requires a refined approach, especially since this is the first opportunity throughout the entire SATA process for the appellant to "be heard." It is a delicate task for the designated judge who must ensure the protection of information relating to national security while simultaneously disclosing what can be released and, if possible, to such a point as to allow the appellant to know enough to meet the case and give guidance to counsel and the *Amici*.

[60] What is more, the designated judge may also receive into evidence anything that is reliable and appropriate while also having the power to base their decision on information or other evidence, even if a summary of that information or other evidence is not provided to the appellant (paras 16(6)(e) and 16(6)(f)). Given the possibility that the designated judge may have to rely on information or evidence that cannot be disclosed to the appellant, even in summary form, and thus cannot be directly challenged by the appellant, the designated judge must ensure that their decision is based on facts and law in an independent and impartial manner. This judicial task was determined to have been achieved in both appeals, as can be seen in the section

entitled “Findings resulting from the appeal proceedings” at page 53 in both Reasonableness Decisions (*Brar 2022* and *Dulai 2022*).

V. Constitutional questions - Section 6 of the *Charter*: Mobility rights

[61] The Appellant (Mr. Dulai) has submitted the following constitutional questions:

> Do sections 8 and 9(1)(a) of the SATA infringe on the Appellant’s mobility rights pursuant to section 6 of the *Charter*?
>
> If so, can this infringement be justified under section 1 of the *Charter*?

A. *Summary of the submissions of the Appellants and Respondent*

(1) Submissions of Mr. Brar

[62] Mr. Brar did not make any specific submissions in relation to section 6 of the *Charter*. Having said that, the Appellant describes in his affidavit the consequences that his listing on the no-fly list has had on his life, his family and his work.

(2) Submissions of Mr. Dulai

[63] Mr. Dulai presented his succinct submissions related to section 6 of the *Charter* in a document dated March 21, 2022, as well as during oral submissions at the public hearings. He submits that his section 6 mobility rights have been violated by the Minister’s decision to deny him the ability to fly domestically. He cannot easily leave or move about the country because of his placement on the no-fly list. He submits that his mobility rights have clearly been restricted.

[64] Mr. Dulai states that subsection 6(2) of the *Charter* was intended to protect the right of a citizen to move about the country, to reside where they wish, and pursue their livelihood without regard to provincial boundaries. From this perspective, a citizen need not be completely cut off from a particular livelihood to make out a section 6 violation. He submits that a violation is established if the person is sufficiently disadvantaged in the pursuit of that livelihood. Therefore, "to pursue the gaining of a livelihood" under paragraph 6(2)(b) should be construed to mean the right to practice on a viable economic basis.

[65] Mr. Dulai advances the argument that boarding an aircraft is a privilege and not a right, but that by virtue of Canada's size, its geographic location and segments that are inaccessible except by air, a purposive approach to the interpretation of mobility rights would recognize that it is impracticable to travel through and outside of Canada without boarding an aircraft.

[66] Mr. Dulai is of the opinion that if the Court agrees with his submission that there are no reasonable grounds to suspect that he will fly by air to commit a terrorism offence, then maintaining his name on the SATA list unjustifiably limits his section 6 mobility rights. Even without that finding, he claims that the Minister's decision to ban his travelling by air within Canada limits his section 6 mobility rights in a manner that cannot be demonstrably justified under section 1 of the *Charter*. This is because of the Court's finding, and the Minister's admission, that there is no evidence that he poses a threat to transportation security. In these circumstances, the prohibition on Mr. Dulai flying domestically cannot be demonstrably justified as a reasonable limit under section 1 of the *Charter*.

[67] Moreover, Mr. Dulai submits that the restriction on his ability to fly domestically is a significant limit on his capacity to pursue a livelihood in provinces outside of British Columbia, more specifically managing and maintaining his television studios in Calgary, Winnipeg, Edmonton, and Brampton. He attempted to maintain the studios by driving from Vancouver to Toronto three times, but each journey was expensive, long, and impractical. Mr. Dulai also runs a joint venture called Yellow Car Rental located near Pearson International Airport in Toronto with a branch outside of Vancouver International Airport. He has not been able to expand the operations of the business because of his inability to fly domestically.

[68] Given the Minister's admission that Mr. Dulai does not pose a threat to air transportation security, the Appellant argues that the ban on flying domestically is not rationally connected to the objective of protecting Canada's national security or preventing him from flying to engage in terrorism-related activity. He maintains that there is no evidence to suggest that he will fly somewhere in Canada to commit a terrorism offence; rather, the Minister's decision refers to foreign travel. In these circumstances, there is no rational connection between the ban on domestic travel and the objectives of the SATA. As can be read, Mr. Dulai is challenging the constitutional validity of sections 8 and 9(1) because he alleges that the listing of his name on the no-fly list breach his mobility rights.

[69] Mr. Dulai describes in his affidavit the consequences that his listing on the no-fly list has had on his life, his family and his work.

(3) Submissions of the Respondent

[70] The Minister (Respondent) presented his written submissions in a Memorandum of Fact and Law dated April 11, 2022. In the document, the Minister requests an order that these appeals be dismissed and that both Mr. Brar and Mr. Dulai's names be maintained on the SATA list. The Minister argues that the SATA proceedings are procedurally fair and consistent with sections 6 and 7 of the *Charter* and that the recourse decision is reasonable and justified on the evidence and the law.

[71] With respect to the section 6 argument, the Minister mentions that "to the extent Mr. Dulai is prevented from entering a province via a particular mode of transportation, this is not an infringement of s. 6(2)(b) of the Charter" and that "while subsection 6(1) of the Charter protects against government action that, in purpose or effect, restricts the ability of Canadian citizens to enter, remain in or leave Canada, it does not protect a right to a particular mode of transportation or the right to travel for leisure or business." The Minister also submits that,

> the recourse decision in Mr. Dulai's case reflected a careful assessment and weighing of the evidence where the Minister's delegate determined that there are reasonable grounds to suspect that Mr. Dulai will travel by air to commit certain terrorism offences. The decision reflects a proportionate balance of the significant national security objectives at stake and any limit on Mr. Dulai's s. 6 mobility rights. (Respondent's Memorandum of Fact and Law at pp 26-30)

[72] Arguments on section 7 are addressed later in this decision.

VI. The *Oakes* or the *Doré* approach

[73] I have explained that no deference was to be given to the Minister's delegate. To that end, I have assumed an active role throughout the confidential and public proceedings to contribute to the fairness process in accordance with the SCC's directives in both *Charkaoui I*, and *Harkat*.

[74] The SATA offers an appeal mechanism rather than a conventional judicial review. Additionally, and as provided for by the SATA, I have received new evidence that was not before the decision maker. My responsibility as a judge was to determine whether or not it was reasonable to place each Appellant on the no-fly list.

[75] In his Notice of Appeal as well as his Notice of Constitutional Questions, Mr. Dulai contests the constitutional validity of sections 8 and 9(1) of the SATA on the basis that they unjustifiably limit his section 6 *Charter* rights. In Mr. Dulai's written and oral submissions on section 6 of the *Charter*, it was not clear whether his position remained that the legislation itself was unconstitutional and not justified pursuant to section 1 of the *Charter*, or whether it was the state action that led to a breach of his section 6 rights which was not justified pursuant to section 1 of the *Charter*. The Minister's counsel submitted that Mr. Dulai was effectively contesting the Minister's decision and that as a result, this argument should be analyzed through the *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] framework. Given the preceding paragraphs and the fact that the constitutional validity of the legislation is contested in Notices of Appeal and Constitutional Questions, I will proceed with an analysis pursuant to the *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] framework examining both the validity of the legislation and the impact of

state action. As a last comment on this matter, I must note that even though each Appellant specifically raised sections 6 and 7 of the *Charter* issues in their administrative submissions, the Minister's delegate remained silent in both of the decisions that are the subject matters of these appeals.

VII. Analysis: Section 6 of the *Charter*

A. *Legislation*

[76] Before proceeding with the analysis of Mr. Dulai's section 6 arguments, it is worth looking at the relevant constitutional and legislative provisions:

(1) Section 6 of the *Charter*

Mobility of citizens	Liberté de circulation
6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada	6 (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.
Rights to move and gain livelihood	Liberté d'établissement
(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:	(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :
(a) to move to and take up residence in any province; and	a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;
(b) to pursue the gaining of a livelihood in any province.	b) de gagner leur vie dans toute province.
Limitation	Restriction

(3) The rights specified in section (2) are subject to:	(3) Les droits mentionnés au paragraphe (2) sont subordonnés :
(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and	a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.	b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.
Affirmative action programs	Programmes de promotion sociale
(4) Sections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.	(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

(2) Sections 8 and 9(1)(a) of the SATA

List	Liste
8 (1) The Minister may establish a list on which is placed the surname, first name and middle names, any alias, the date of birth and the	8 (1) Le ministre peut établir une liste sur laquelle il inscrit les nom et prénoms, tout nom d'emprunt, la date de naissance et le genre de toute

gender of any person, and any other information that is prescribed by regulation that serves to identify the person, if the Minister has reasonable grounds to suspect that the person will

personne — ainsi que tout autre renseignement prévu par règlement permettant de l'identifier, à l'égard de laquelle il a des motifs raisonnables de soupçonner qu'elle :

(a) engage or attempt to engage in an act that would threaten transportation security; or

a) soit participera ou tentera de participer à un acte qui menacerait la sûreté des transports;

(b) travel by air for the purpose of committing an act or omission that

b) soit se déplacera en aéronef dans le but de commettre un fait — acte ou omission — qui :

(i) is an offence under section 83.18, 83.19 or 83.2 of the Criminal Code or an offence referred to in paragraph (c) of the definition ***terrorism offence*** in section 2 of that Act, or

(i) constitue une infraction visée aux articles 83.18, 83.19 ou 83.2 du Code criminel ou à l'alinéa c) de la définition de infraction de terrorisme à l'article 2 de cette loi,

(ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i).

(ii) s'il était commis au Canada, constituerait une des infractions mentionnées au sous-alinéa (i).

Review of list

Examen périodique de la liste

(2) The Minister must review the list every 90 days to determine whether the grounds for which each person's name was added to the list under subsection (1) still exist and whether the person's name should remain on the list. The review does not affect the validity of the list.

(2) Tous les quatre-vingt-dix jours, le ministre examine la liste afin de déterminer si les motifs sur lesquels il s'est basé pour inscrire le nom de chaque personne en vertu du paragraphe (1) existent encore et si le nom de la personne devrait demeurer sur la liste. L'examen est sans effet sur la validité de la liste.

Amendment of list

Modifications apportées à la liste

(3) The Minister may at any time amend the list	(3) Le ministre peut en tout temps modifier la liste pour :
(a) by deleting the name of a person and all information relating to them if the grounds for which their name was added to the list no longer exist; or	a) soit enlever le nom d'une personne de la liste ainsi que tout renseignement la visant, si les motifs pour lesquels le nom a été inscrit sur la liste n'existent plus;
(b) by changing the information relating to a listed person.	b) soit modifier les renseignements visant une personne inscrite.
Exemption from Statutory Instruments Act	Loi sur les textes réglementaires
(4) The list is exempt from the application of the Statutory Instruments Act.	(4) La liste est soustraite à l'application de la Loi sur les textes réglementaires.
Directions	Directives
9 (1) The Minister may direct an air carrier to take a specific, reasonable and necessary action to prevent a listed person from engaging in any act set out in subsection 8(1) and may make directions respecting, in particular,	9 (1) Le ministre peut enjoindre à un transporteur aérien de prendre la mesure raisonnable et nécessaire qu'il précise en vue d'éviter qu'une personne inscrite commette les actes visés au paragraphe 8(1). Il peut en outre lui donner des directives relatives, notamment :
(a) the denial of transportation to a person; or	a) au refus de transporter une personne;

[77] To conduct a conclusive analysis, one must be aware of and understand not just the applicable legal requirements listed above, but also the SATA's dual purpose:

> 1) Give the Minister of Public Safety and Emergency Preparedness [Minister] the power to identify and respond to persons who may engage in an act that poses a threat to transportation security or who may travel by air for the purpose of committing a terrorism offence; and
>
> 2) Ensure that these individuals can rely on both an administrative review with an opportunity to make representations, and on an

> appeal mechanism that allows them to be heard while ensuring that national security information is protected.

[78] Since this concept is essential, I will mention it again. It is important to establish a careful balance between the rights and freedoms of individuals while at the same time protecting national security information, and the safety of Canadians when travelling by air is fundamental (see *Brar 2020* at paras 60-67).

B. *The intricacies of the current appeals*

[79] The Appellants are barred from travelling by air, both domestically and internationally (see Revised Appeal Books at p 27 (Brar) and at p 30 (Dulai)). They can still depart Canada, however, via other modes of transportation and travel within Canada by car, bus, or train. The rationale for the air travel ban is the Minister's conclusion that there are reasonable grounds to suspect that the Appellants will travel internationally by air to commit terrorism offences.

C. *The meaning of mobility*

[80] The term "mobility" is not defined in the *Charter*. However, under section 6, every citizen has the right to enter, remain in, and leave the country. In addition, every citizen and permanent resident has the right to move to and live in any province as well as the right to pursue the gaining of a livelihood in any province. Subsection 6(1) of the *Charter* is concerned with international movement and subsection 6(2) is concerned with movement within Canada to take up residence or to pursue the gaining of a livelihood.

[81] Nonetheless, it is not evident from a plain reading of section 6 whether mobility rights may encompass specific means to give them effect, or in other words, specific modes of transportation used to carry out these movements. Indeed, given Canada's geography and location on the world map, it is reasonable to expect that certain movements allowing residents to reach their destination will be made by air.

[82] Canadian jurisprudence on mobility rights reveals that courts have thus far understood mobility in absolute terms, meaning that the concept of mobility only extended to one variable, that of movement. Below are cases that may be useful in understanding where courts stand on section 6 of the *Charter* and mobility rights in different situations:

- Extradition – *United States of America v Cotroni*, [1989] 1 SCR 1469 [*Cotroni*], *Sriskandarajah v United States of America*, [2012] 3 SCR 609;
- The right to a passport – *R v Nikal*, [1996] 1 SCR 1013, *Khadr v Canada (Attorney General)*, [2007] 2 FCR 218 (TD), *Kamel v Canada (Attorney General)*, [2009] 1 FCR (TD)), the *International Transfer of Offenders Act* (ITOA), *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157 [*Divito*];
- The right to inter-provincial mobility – *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 [*Skapinker*], *Black v. Law Society of Alberta*, [1989] 1 SCR 591 [*Black*];
- The right to move to and take up residence in any province – *Skapinker*, and
- The right to pursue the gaining of a livelihood in any province – *Black*, *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157.

In these cases, the courts looked at individuals' situations from a spatial perspective to determine whether their movements were restricted.

[83] Since the scope of section 6 of the *Charter* encompasses movements within Canada as well as the possibility to leave and enter the country, it is conceivable that the framers of the *Charter* had in mind that mobility could be given effect through different modes of transportation. While air travel and railroad transit were both common at the time of the *Charter*'s inception, flying has since become significantly more accessible and prevalent.

[84] The world's geopolitical and security contexts have changed dramatically since the adoption of the *Charter*, especially vis-à-vis the focus given to the fight against terrorism in the aftermath of the terrorist attacks of September 2001. As a result, our understanding of mobility rights, as envisioned in the early 1980s, ought to evolve and adapt while remaining true to the drafters' original objectives (*The Living Tree Doctrine*, Peter W Hogg, Constitutional Law of Canada, vol 2, 5th ed (Scarborough: Thomson, 2007) at 36.8(a)).

[85] While the concept of movement is significant in Mr. Dulai's appeal, the central issue revolves around the manner in which movement, or travel, is undertaken. Given that a particular mode of transportation is being prohibited, this Court is compelled to consider mobility from a novel perspective. As far as this Court is aware, this is a first in Canada, as tribunals have, until now, only assessed mobility from a "migration" perspective, often overlooking the means by which it is carried out. In contemporary Canadian society, mobility may no longer always constitute a one-dimensional notion that singularly defines movements within and outside the country; part of the equation may have to involve the way by which these movements are given effect.

[86] In these appeals, the Appellants may travel however they wish, except by air. Although travel is not completely eliminated, this restriction has impacted their mobility. This Court has to gauge the degree to which the denial of air transportation infringes on a fundamental right, whether it is justified, and if so, whether this infringement can be minimized. For example, it could be possible for an individual on the no-fly list to travel domestically but not internationally, or to travel by air if they undergo increased security measures and are escorted by a security officer. Indeed, these options appear in the "recommended directions" published by the Department of Public Safety Canada and could be issued in accordance with subsection 9(1) of the SATA (see Revised Appeal Book in Dulai at pp 36, 53, 64, 84, 275 and 348). These types of directions may enable the Department to authorize a listed individual to travel by plane. Discretionary conditions may be tailored to the listed individual, thus limiting the SATA's impact on mobility rights.

[87] Given the above, a comprehensive understanding of freedom of movement is required, as air transportation security regulations might result in denial of air transportation in some instances while allowing it in others, hence influencing freedom of movement to varying degrees.

[88] Having framed the legislation at play, described the perpetual challenge of balancing national security concerns and individual rights and freedoms, outlined the evolving view on mobility rights, now is the time to consider the jurisprudential concepts that go into interpreting the *Charter* in light of mobility rights.

(1) Interpreting the *Charter*

(a) *Purposive analysis and jurisprudential guidance on mobility rights*

[89] The very basis of *Charter* interpretation is purposive analysis. This calls for a generous and liberal interpretation where the meaning of a right must be defined in light of the interests it is supposed to defend. When dealing with section 6 of the *Charter*, Justice Dickson (as he then was) said in *Black* that:

> A purposive approach to the *Charter* dictates a broad approach to mobility. Section 6(2) protects the right of a citizen (and of a permanent resident) to move about the country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries. The provinces may regulate these rights but, subject to ss. 1 and 6 of the *Charter*, cannot do so in terms of provincial boundaries. That would derogate from the inherent rights of the citizen to be treated equally in his or her capacity as a citizen throughout Canada. This approach is consistent with the rights traditionally attributed to the citizen and with the language of the *Charter* (at p 4).

[90] The *Charter* recognizes the right to leave the country as well as the right to return ("enter"). In *Cotroni*, Justice Wilson (dissenting, but not on this issue) had the following to say regarding subsection 6(1):

> [73] Applying these guidelines [Big M Drug Mart], it is my view that s. 6(1) of the *Charter* was designed to protect a Canadian citizen's freedom of movement in and out of the country according to his own choice. He may come and go as he pleases. He may elect to remain. Although only Canadian citizens can take advantage of s. 6(1) the right protected is not that of Canadian citizenship. Rather, the right protected focuses on the liberty of a Canadian citizen to choose of his own volition whether he would like to enter, remain in or leave Canada. Support for this interpretation is found in the language of the other subsections of s. 6 and in the heading of s. 6 "Mobility Rights".

[91] It is important to differentiate between the two sets of rights encompassed in the *Charter* at subsections 6(1) and 6(2). To this effect, Justice Abella wrote, in *Divito*:

> [17] There are therefore two sets of mobility rights. The first set, found in s. 6(1), is the right of every Canadian citizen to enter, remain in, and leave Canada. The second set, outlined in s. 6(2) to (4), gives citizens and permanent residents the right to move to, live in, and work in any province subject to certain limitations.

Considering this, the right to enter, remain, and leave Canada provides for international mobility for every Canadian citizen and a national mobility for Canadian citizen and permanent resident. On the other hand, the right to remain in Canada and establish residence is also protected under paragraph 6(2)(a) of the *Charter*. In the present cases, the matter relating to establishing residence in a province is not at issue but paragraph 6(2)(b), "to pursue the gaining of a livelihood in any province" is relevant.

(b) *Section 6 mobility rights are not subject to the notwithstanding clause*

[92] It is worth noting that section 6 rights, like certain other *Charter* rights such as the right to vote protected by section 3, are excluded from the application of section 33 of the *Charter*. Such an exclusion indicates the special importance given to these rights by the framers of the *Charter*. Indeed, as explained in *Frank v Canada (Attorney General)*, 2019 SCC 1 [*Frank*], in the context of the right to vote, "any intrusions on this core democratic right are to be reviewed on the basis of a stringent justification standard" (para 45). The significance of rights not being subject to section 33 was reiterated in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13:

> [148] Second, s. 23 is not subject to the notwithstanding clause in s. 33 of the Charter. The decision in this regard reflects the importance attached to this right by the framers of the Charter as

> well as their intention that intrusions on it be strictly circumscribed. In *Frank v. Canada (Attorney General)*, 2019 SCC 1, which concerned the right to vote of Canadians residing abroad, I reiterated McLachlin C.J.'s statement in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, that the framers had signalled the special importance of that right by excluding it from the scope of the notwithstanding clause. I added that, because of this exemption, any intrusions on the right are to be reviewed on the basis of a stringent justification standard (*Frank*, at para. 25; *Sauvé*, at paras. 11 and 14). This also applies in the context of s. 23.

(c) *The interpretative language*

[93] Language is an important medium of communication, especially in a country like Canada where bilingualism is one of our core values of inclusiveness and diversity. Linguistics can be particularly valuable in law when wanting to convey meaning and nuances. Depending on the language in which a particular statute or legislation is referred to, it can be understood differently. These differences demand the most in-depth consideration to appreciate the legislation's objective. This is the case with the *Charter*'s mobility rights under section 6.

[94] Interestingly, subsection 6(2) benefits from a broader interpretation in the French version than in the English one: "de se déplacer dans tout le pays et d'établir leur résidence dans toute province" as opposed to "move to and take up residence in any province." In *Shapinker*, Justice Estey emphasized this difference:

> [26] I return to subs. (2) itself. Paragraph (a) is pure mobility. It speaks of moving to any province and of residing in any province. If (b) is caught up with (a), it is likewise a mobility provision. If it is separate when properly construed, then it may, as the respondent urges, be a "right to work" clause without reference to movement as a prerequisite or otherwise. The presence of the conjunction "and" in the English version is not sufficient, in my view, to link

> (a) to (b) so as to create a single right. Conversely, the absence of the conjunctive link in the French language version is not sufficient to separate the two clauses completely. In the first alternative interpretation, *supra*, if only one right is created by subs. (2), then a division into paras. (a) and (b) is superfluous. Moreover, this suggested interpretation of s. 6(2) is inconsistent with s. 6(3) which subjects the "rights specified in subsection (2)" to certain limitations. (Emphasis added)

[95] Justice Estey, who was writing for the majority, therefore concluded that:

> [33] […] para. (b) of subs. (2) of s. 6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in para. (a) and in para. (b)) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence. Paragraph (b), therefore, does not avail Richardson of an independent constitutional right to work as a lawyer in the province of residence so as to override the provincial legislation, the *Law Society Act*, s. 28(c), through s. 52 of the *Constitution Act, 1982*.

For these reasons, we can confidently state that even if there is no stand-alone right to work, there is still a connection between subsection 6(1) "[e]very citizen of Canada has the right to enter, remain in and leave Canada" and paragraph 6(2)(b) "to pursue the gaining of a livelihood in any province" – "de gagner leur vie dans toute province."

[96] This was also taken up in *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, a recent case about whether provincial governments have the legislative right to limit domestic travel across their borders. The alleged right at issue in this case was not the right to work or settle in Newfoundland and Labrador per se, but rather the right to travel to attend a family member's funeral. Because there was no case law dealing with a similar infringement of mobility rights, Justice Burrage conducted a novel analysis of these rights and their application to interprovincial travel. He concluded that "'the right' to 'remain in' Canada, as embodied in

s. 6(1) of the *Charter*, includes the right of Canadian citizens to travel in Canada for lawful purposes across provincial and territorial boundaries" (para 301).

[97] Justice Burrage also drew a difference between the "right to move" intended as mobility and the "right to move" intended as taking up residence. His line of reasoning on this point is reproduced below:

> [370] Rather, I interpret the language "to move to" as conjunctive with the taking up residence in any province, such that the right as defined is singular, the right to move to and take up residence.
>
> [371] Does such an interpretation mean that the language "to move to" is superfluous, such that s. 6(2)(a) might simply read as the right to "take up residence" in any province?
>
> [372] I do not think so, for the right is a mobility right, not a static right of residence. I am prepared to take judicial notice of the fact that from time to time Canadians change their place of residence in Canada. That said, this case does not concern what is meant by "residence", as by any reasonable interpretation Ms. Taylor did not wish to come to Newfoundland and Labrador for that purpose.
>
> [373] I would thus interpret the right to move to and take up residence as the right to live anywhere in Canada and to move freely about the country for that purpose, subject to the limitations in s. 6(3).
>
> [374] Viewed from this perspective s. 6(2) does not encompass the right simpliciter of Canadian citizens and permanent residents to travel across provincial and territorial boundaries. As we have seen, that right is reserved for Canadian citizens under s. 6(1) of the *Charter*. Rather, subject to the qualifications in s. 6(3) the mobility rights guaranteed by s. 6(2) are those of residency and employment. The right to move to and live anywhere in Canada and the right to earn a livelihood in any province. Such an interpretation is in keeping with the historical purpose of s. 6(2) which had as its concern the economic integration of the country (*Black*, at paras. 40 and 41).

[98] Such a perspective of mobility rights demonstrates the importance of the facts underlying the issues at hand when considering mobility rights.

[99] I will now shift my attention to the specific concerns of the current proceedings.

(d) *Analysis: Subsection 6(1) – International mobility rights*

[100] Mr. Dulai suggests that his subsection 6(1) mobility rights have been violated by the Minister's decision to deny him the ability to fly internationally. Because Mr. Dulai's name is on the no-fly list, he is unable to travel to other countries by air. As previously indicated, in Canada, flying is currently the most popular mode of transportation to most foreign destinations, just as sailing used to be. The ability to travel by air has become an essential part of modern life. It is comparable to possessing a passport, access to which should not be interfered with lightly. To this effect, the Court of Appeal of Ontario, in *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215, commented that:

> [54] In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play *Charter* considerations; the guarantee of mobility under s. 6 and perhaps even the right to liberty under s. 7. In my view, the improper refusal of a passport should, as the English courts have held, be judicially reviewable.

[101] If a passport constitutes a necessity in today's world, it follows that the means of transportation to give effect to travel is as well, when alternative means available are just not reasonable, realistic and practical. Mr. Dulai cannot travel by air, which prevents him from

leaving the continent by plane. Since the right to leave Canada is a component of subsection 6(1), imposing such unreasonable, unrealistic and impractical limits is an infringement on the international mobility right that has to be justified in accordance with section 1 of the *Charter*. Indubitably, mobility is part of the modern world and an essential component in fulfilling professional, personal, leisure, and family needs. Denying that these needs should be cherished and protected goes against basic liberties. From this perspective, the right to leave, return, and live in Canada encompassed in subsection 6(1) of the *Charter* are part of society's fundamental values and must be recognized as such. I therefore find that Mr. Dulai's subsection 6(1) rights have been breached.

(e) *Analysis: Subsections 6(2), 6(3), and 6(4) – National mobility rights for the purpose of taking up residence in any province and to pursue the gaining of a livelihood in any province*

[102] Conversely, subsections 6(2), 6(3) and 6(4) of the *Charter* call for a different approach. While paragraph 6(2)(a) of the *Charter* (residence) is not in dispute in Mr. Dulai's appeal, paragraph 6(2)(b), the right to pursue the gaining of a livelihood in any province, requires examination in this case. The evidence establishes that until Mr. Dulai was denied boarding on May 17, 2018, air travel within Canada was important for him to earn a living. Mr. Dulai chose to live in British Columbia and is a partner in a car rental joint venture ("Yellow Car Rental") with Mr. Brar, who pioneered this type of business model near Toronto's Pearson Airport. Because of the business' success, Mr. Brar supported its extension into the British Colombian market, where Mr. Dulai became involved. Mr. Dulai is also a partner in "Channel Punjabi", a television station that broadcasts news, music series, talk shows, religious programs, and comedy, among other things. Channel Punjabi has operated studios in Vancouver, Calgary,

Edmonton, and Toronto since 2015. Mr. Dulai routinely travels between provinces to tend to each studio, and travels abroad to cover various events (Parvkar Singh Dulai Application for Recourse – written submissions, January 2, 2019, included in the Revised Appeal Book at p 163 [Dulai's submissions, Revised Appeal Book], Affidavit dated January 30, 2022 at p 4, para 29).

[103] Since May 2018, however, Mr. Dulai has not been allowed to travel by plane within or outside Canada. He can still travel by car, bus, or rail, but depending on the destination, travel time is most likely to be much longer than if he were flying. Mr. Dulai submits the following in his affidavit:

> [119] Being placed on the no-fly list has had a tremendous physical, psychological, and financial effect on me.
>
> [120] In 2018, I was at the height of establishing a Punjabi-speaking television channel that was increasing in subscriptions each month, not just in Canada, but internationally. I was actively working to grow the studio with the aim of connecting the diaspora of Punjabi-speaking people across the world through celebrating our language and culture. I was dedicated to Channel Punjabi economically, but also because it allowed me to increase the connectedness of my community. This business venture allowed me to marry my economic activity with my philanthropic passion.
>
> [121] In 2016, I opened studios in Calgary and Edmonton. I had to travel from B.C. to these newly-established studios regularly. I usually travelled by plane because flying was much faster and more affordable than driving. During this time, I estimate that I travelled every four to six weeks so I could find events worth covering, work closely with each team on the ground, and promote a cohesive culture within the organization.
>
> [122] During 2016 to 2018, I was focused on business development. I travelled frequently to cover events across the country and internationally to increase viewership and subscriptions to the Channel. I covered Vaisakhi parades internationally. I covered sporting events, such as Kabaddi tournaments, and concerts. I was effectively looking to cover any event that was culturally significant.

> [123] In early 2018, we were in the planning stage of opening a studio in Winnipeg. We had hired one employee and we were looking [to] secure office space.
>
> [124] In May of 2018, after I was put on the no-fly list, the newest studios struggled the most, especially the one in Winnipeg. It was not feasible for me to drive to Winnipeg, especially in the winter. By the winter of 2018, I had to shut down the Winnipeg studio, as it was struggling and losing money.
>
> [125] Initially, I thought that the appeal process would conclude quickly, and I held on to the hope of being able to fly again to manage the Calgary and Edmonton studios. I drove across the country to Toronto three times to check on the studios. The drive was expensive, long, and impractical. As the appeal proceedings continued, it became financially untenable for me to keep the Calgary and Edmonton studios open. By late winter of 2019, I closed the Calgary and Edmonton studios, suffering a major financial loss, as we had purchased equipment to launch these studios. We closed the Brampton studio in the summer of 2021.
>
> [126] The closing of these studios harmed me both financially and psychologically. I am saddened that the vision that I had for Channel Punjabi could not be realized due to my inability to fly and tend to these studios.

[104] Though teleworking or moving to another province would offer possible limited solutions, they still create obstacles in the pursuit of a livelihood and they go against allowing Canadians and permanent residents to move freely from sea to sea, establish themselves wherever they choose, and work within Canada without being constrained by provincial boundaries.

[105] The COVID-19 pandemic has had a significant impact on public transportation. Individuals and businesses have changed their ways of operating because of the necessity to maintain physical distance and adhere to public health regulations. As we slowly recover from a global health crisis, the demand for air travel is increasing, and new health measures are being

implemented to keep passengers safe. In essence, there is still a need for air travel for business objectives. In *Black*, at page 34, former Chief Justice Dickson wrote:

> What section 6(2) was intended to do was to protect the right of a citizen (and by extension a permanent resident) to move about the country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries.

[106] The essence of paragraphs 6(2)(a) and 6(2)(b) is that Canadians should be treated equally insofar as they should have the freedom to live and work in the province or provinces of their choosing. Provincial boundaries are not to be used as barriers to residence or employment. As a result, a Canadian or permanent resident can work in one or more provinces without establishing residency in each. As previously said, Canada is a large country, and business travel often necessitates air transportation. For someone whose job entails activities in more than one province, the prohibition on travelling by plane can have significant impact on their capacity to work. The fact that Mr. Dulai's national mobility rights do not include air travel has clearly hampered his ability to earn a living in provinces other than his own, as demonstrated by the evidence (see Mr. Dulai's affidavit dated January 30, 2022 at pp 15-16).

[107] I believe that travelling to and out of Canada as well as within Canada for personal or business purposes is not a privilege, but rather a necessity in today's world for Canadian citizens. Given that his name is on the no-fly list, the Appellant, a Canadian citizen, is unable to travel in a reasonable, realistic and practical manner in and out of Canada, or domestically for professional or personal reasons. He is unable to travel by air within the country to tend to his business, despite the fact that the right to seek a living in any province is a constitutional right under paragraph 6(2)(b) of the *Charter*. Air travel is necessary for international travel, but it is equally

necessary for domestic travel in a country as large as Canada. Flying has also become crucial for many Canadians in today's working environment, and denying the Appellant this option limits his ability to work. As a result, I find that Mr. Dulai's subsection 6(2)(b) rights have been breached.

[108] Given that I have found breaches of Mr. Dulai's rights, I will now examine whether section 1 of the *Charter* can justify these violations.

(2) Analysis: Section 1 of the *Charter*

(a) *General*

[109] Section 1 of the *Charter* reads as follows:

> 1) The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[110] The two key components of section 1 of the *Charter* are that it guarantees rights and freedoms subject only to 1) reasonable limits prescribed by law, and 2) as long as it can be demonstrably justified in a free and democratic society. Chief Justice Dickson details these functions in *Oakes*:

> [63] It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned

> limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, supra, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."

[111] No right is absolute. Imposing a limit on mobility rights may be justified in appropriate circumstances, such as a reasonable method of addressing national security concerns. Section 1 creates a balance between individual rights and social interests by allowing limits on fundamental rights and freedoms, as stated in *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610 [*JTI-Macdonald*]:

> [36] Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate.

[112] That being said, the application of section 1 still needs to be guided by specific values and principles, as outlined in *Oakes*:

> [64] The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

[113] Once a violation has been identified, as it was for both international and national mobility rights in this case, the burden of proof is on the Minister to justify the limits, and the applicable standard of proof is the civil balance of probabilities standard:

> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at

> common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow. (*F.H. v McDougall*, 2008 SCC 53)

[114] In order to demonstrably support the justification for the limits, the Minister may present an evidentiary record related to the limits imposed that are both logical and well reasoned. Justices Sopinka, McLachlin and Major expanded on this idea in *JTI-Macdonald*:

> The appropriate test in a s. 1 analysis is that found in s. 1 itself: whether the infringement is reasonable and demonstrably justified in a free and democratic society. No conflict exists between the words of s. 1 and the jurisprudence founded upon *Oakes*. The word "demonstrably" in s. 1 is critical: the process is neither one of mere intuition nor of deference to Parliament's choice. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that, before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. (p 204)

[115] The burden of proof first requires that the Minister show that the infringements or limits on the mobility rights are "prescribed by law" in that it is either express or implied in a statute or a regulation. Former Chief Justice McLachlin clarified this point in *R v Orbanski; R v Elias*, 2005 SCC 37:

> [36] It is settled law that a prescribed limit may be implied from the operating requirements of a statute. In *Therens*, Le Dain J. described the meaning of the words "prescribed by law" as follows (at p. 645):

> Section 1 requires that the limit be prescribed by law, that it be reasonable, and that it be demonstrably justified in a free and democratic society. The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.
>
> [Emphasis added.]

[116] If the limits on a *Charter* rights are "prescribed by law", the analysis continues by examining the following questions:

1. Is the purpose of the law or the infringing state action sufficiently pressing and substantial to justify curtailing a *Charter* right?
2. Is there proportionality between the object of the legislation or the state action and the means to achieve it? Proportionality is understood as having three components:
    i) Rational connection to the objective;
    ii) Minimal impairment of the right; and
    iii) Proportionality between the effects of the measure and the objective.

[117] To conduct this analysis, I will be direct and factual, basing my answers exclusively on publicly accessible facts. First, it is worth noting that the SATA's objective is obvious, clear and transparent, and its effects on appellants can be weighty, as mentioned several times in this decision.

(i) Is the infringement prescribed by law?

[118] The SATA's provisions limiting the Appellant's section 6 rights are well-defined, explicit, and legally binding. Section 8 provides for listing an individual on the no-fly list and section 9 for ministerial directions to an air carrier to prevent a listed person from travelling by air to commit a terrorism offence. Indeed, I do not understand Mr. Dulai to be arguing that the Minister did not have the statutory authority to issue the section 9 directions.

(ii) Is the objective pressing and substantial?

[119] The limits imposed on Mr. Dulai are the result of evidence-based suspicions that he could fly abroad in order to plot a terrorist attack. Canadians expect their Government to provide a safe environment where they can live their lives without worrying about terrorist acts. They trust that their Government will do everything in its power to prevent such acts, whether at home or abroad.

[120] As noted in the *National Security Act (2017)* preamble, the Government must enact laws that protect national security and intelligence activities in a way that respects rights and freedoms and encourage the international community to do the same. Protecting national security is a pressing and substantial objective.

[121] Furthermore, Canada's interests in preserving global security were always founded on a commitment to multilateralism and the concept of a rules-based international order. In this regard, Canada was an important architect of multilateral organizations and an essential voice for

the liberal international order at the end of World War II, participating in the establishment of the United Nations, NATO, and the Bretton Woods institutions. In addition to these international institutions, different alliances and multilateral engagements have all provided valuable and friendly fora in which to discuss and, at times, devise a collective response to national security concerns. As an illustration, Canada is a member of prominent security groups such as the North American Aerospace Defense Command (NORAD), NATO and the Five Eyes security alliance, all of them promoting collaboration and information sharing between allies. By virtue of its participation in these alliances and treaties, Canada is deeply invested in countering global and domestic terrorist threats, addressing international arms control and the proliferation of weapons (The Proliferation Security Initiative), promoting and protecting a free, open and secure cyberspace and fighting illegal drug trade, human smuggling, money laundering (Financial Action Task Force), and other activities of international organized crime.

[122] In this light, Canada's efforts to ensure the safety of air travel for all Canadians and passengers is a pressing legislative goal of the SATA and part of a larger thrust to promote security beyond national borders, as required by Canada's role on the international stage.

[123] Against this background, it goes without saying that ensuring air safety for Canadians and providing a fair process to allow listed individuals to make representations and/or appeal a decision is an objective of the SATA that is clearly expressed, pressing, and substantial. Similarly, the Minister's decision to give effect to this objective is pressing and substantial.

(iii) Is there proportionality between the legislative objective and the means to achieve it?

[124] The proportionality concept refers to whether the Government has selected proportional or relative methods to achieve its legislative goals. To put it another way, the Government must devise acceptable methods for enacting or implementing its legislative goals. A restriction on a *Charter* right cannot be arbitrary or unrelated to the law's objective. It must be used in a way that is consistent with the facts of each case, and ensure that less impactful alternatives were examined. There must be manoeuvring room in implementing such a decision. The requirement of proportionality requires this.

(b) *Is the law or state action rationally connected to its purpose?*

[125] The SATA's purpose is to prevent terrorist offences involving air transportation in Canada or elsewhere around the world, or the facilitation of such offences through air transportation in Canada or abroad. Other countries such as Australia, the European community (through the *Schengen* Information System, or "SIS"), India, Pakistan, the United Kingdom and the United States each have their own system designed to deter terrorist threats linked to air travel. However, processes vary significantly among nations. For example, while Australia does not have an analogous system to the Canadian SATA list, its authorities can still remove a person from an area or an aircraft when suspected of committing or having committed an offence as per its *Transport Security Amendment (Serious Crime) Act 2021*.

[126] To be listed in Canada, a person must first be identified. The person's information is subsequently sent to the PPAG who then recommends to the Minister or his representative whether the individual should be listed or not (see *Brar 2020* at paras 72-76). The list is reviewed every 90 days. A person may be delisted as a result of a periodical review where information can be added and updated or following to an administrative review or an appeal as provided by the legislation.

[127] Depending on a recommendation of the PPAG and a decision of the Minister, a listed individual may still be able to travel, albeit under certain conditions such as additional screening, the presence of a security officer on board, constraints regarding international and/or domestic flights and other in-flight options. For example, a person may not be able to travel internationally but may do so domestically.

[128] The SATA strives to protect air transportation against terrorist attacks, and one method of doing so is to impose restrictions on mobility rights where there is an evidentiary basis for doing so. Such restrictions can be applied in many different ways, as outlined above. Therefore, there is a causal link between the goal of air transportation safety, terrorist attacks, and the restrictions that can be enforced that flow from the SATA. As a result, the provisions of the law that lead to limiting an individual's movements are rationally connected to the law's purpose. This was conceded in part in Mr. Dulai's submissions where he mentioned that "[a]lthough the aim and means of the SATA are reasonable and demonstrably justified, the direction of the Minister in this case is not minimally impairing" (Revised Appeal Book in Dulai at p 179). Similarly, given

my finding in the Reasonableness Decisions, the state action limiting his mobility rights is rationally connected to the law's objective.

(c) *Does the law or state action minimally impair the infringed right?*

[129] A law or government action that infringes *Charter* rights can be justified as long as the right at stake is impaired as little as possible. In other words, if the Government can achieve its legislative objective in a way that involves a lesser impairment of a right, it must do so. In the case at issue, the SATA scheme infringes Mr. Dulai's national mobility rights because his listing combined with ministerial directions prevent him from using air transportation within Canada for the purpose of his work, and limit his international mobility rights because it would be unreasonable, unrealistic and impractical for him to travel to most other countries by means other than air transport.

[130] As long as an individual is suspected of posing a threat to Canadian air travel, the decision to bar them from using air transportation to travel domestically can be justified. This is also true if the person is presumed to be using Canadian air transportation to travel to an international destination in order to commit a terrorist act in violation of Canadian law (see subparagraphs 8(1)(b)(i) and (ii) of the SATA). In that case, the safety objective of the SATA is causally linked to the violation of the national mobility right and as such, the means deployed to achieve this goal can vary.

[131] For these reasons, I believe that the SATA obstructs mobility only to the extent that is necessary to accomplish the goal of air transport safety. Ensuring safety in air transportation and

limiting air travel for terrorist purposes necessarily involves some infringement of mobility rights.

[132] Although not raised by Mr. Dulai, it is worth pointing out that the text of the SATA itself does not limit the mobility rights. Rather, the restrictions on mobility are a result of being listed pursuant to section 8 and a combination of the *Secure Air Travel Regulations* and ministerial directions issued pursuant to subsection 9(1) of the SATA. That being said, the SATA scheme is not a blunt instrument; the scheme provides discretion to the Minister to adapt restrictions to the particular circumstances of individuals. Indeed, the Minister has enumerated a list of "recommended directions" that can be made with respect to listed persons (see Revised Appeal Book in Dulai at pp 36, 53, 64, 84, 275 and 348). As a result, the scheme allows for the impairment of an individual's rights to be commensurate to the threat posed by that individual, thus minimally impairing the right.

[133] Similarly to what I noted above, given my finding in the Reasonableness Decisions, I am satisfied that the state action limiting his mobility rights is, in this case, minimally impairing. Nonetheless, the SATA 90-day review of Mr. Dulai and Mr. Brar will have to take into consideration the fact that the Minister's delegate's finding concerning air transportation safety (paragraph 8(1)(a) of the SATA) is not supported by evidence and is therefore unreasonable. The Minister will have to determine whether a complete prohibition on domestic and international travel is still warranted, especially when the evidence presented in these proceedings relates to flying for the purpose of performing an act [or omission] related to a terrorist offence abroad, and not domestically.

(3) Do the positive effects of the law or state action outweigh the negative effects of the legislation or state action?

[134] Courts must ask if the limits on the right are proportional to the importance of that law's purpose. They must also ask whether the benefits of the law are greater than any negative effects produced by a limitation on a right. In concluding the proportionality issue, do the positive effects in this specific case outweigh the negative effects that the legislation has on a listed individual?

[135] Comprehensive and timely steps are required to ensure public safety. When a terrorist attack involving air travel occurs, it is too late to apply stronger measures. To prevent these offences from occurring in the first place, proactive measures are required. Limiting mobility rights has a positive impact because it helps to assure air transportation safety while also creating a necessary climate of trust for everyone. I am aware that limits imposed on Mr. Dulai's travel have had significant negative consequences on him and his family and I have no doubt that such restrictions are difficult to bear. The SATA scheme provides for a 90-day review of each person on the list, which can yield positive outcomes for the appellants.

[136] When I weigh the benefits and disadvantages and draw a line between them, the safety of air transportation from terrorist attacks and Canadians' trust in air travel and their Government trump the negative consequences of the Appellant's mobility rights being infringed, whether for international travel or to earn a living domestically. I can only conclude that the overall air safety issue outweighs any negative impact on both Appellants.

D. *Conclusion on section 6 of the* Charter

[137] The constitutional question is answered in the following way :

> Do sections 8 and 9(1)(a) of the SATA infringe on the Appellant's mobility rights pursuant to section 6 of the *Charter*?

The answer is that those provisions alone do not infringe the Appellant's mobility rights, but the SATA scheme does.

> Can this infringement be justified under section 1 of the *Charter*?

The answer is yes.

I note that had I conducted an analysis pursuant to the *Doré* framework, as suggested by the Minister's counsel, my above reasoning would apply to find that the restriction imposed on Mr. Dulai's mobility rights by the Minister's decision was reasonable.

VIII. Constitutional questions – Section 7 of the *Charter* – Life, Liberty and Security of the Person

> Do sections 15 and 16 of the SATA violate the Appellants' rights to section 7 of the *Charter*, specifically their rights to liberty and security of the person, because they permit the Minister, and the Court, to determine the reasonableness of the Appellants' designation as listed persons, and the reasonableness of the Minister's decision based on information that is not disclosed to the Appellants and in relation to which they have no opportunity to respond?
>
> The Appellants add that the violation of their section 7 rights is not justified by section 1 of the *Charter*. The question has been worded differently in both appeals but the substance remains the same.

A. *Summary of the submissions of the Appellants and Respondent*

(1) Submissions of Mr. Brar

[138] Mr. Brar presented his written submissions on March 21, 2022. In that document, he highlights that despite never having been convicted of an offence in Canada or elsewhere, and despite never having been accused of involvement in terrorist-related activities of any kind, on April 23, 2018, his name was added to the no-fly list and he was prohibited from travelling by air pursuant to the SATA. His listing has since been maintained causing psychological suffering, as well as negatively affecting his family and business.

[139] Mr. Brar is of the opinion that he was never granted an opportunity to meaningfully respond to what he calls "unsourced allegations" levied against him because section 20 of the SATA prohibits identification of those who are listed and, by necessary implication, the reason for their listing. His primary position is that the information provided, in the circumstances of this case, does not meet the incompressible minimum standard established by the SCC in *Harkat* as being required to satisfy the requirements of procedural fairness and compliance with section 7 of the *Charter*. The failure to provide any information, even in summary form, regarding the source of the allegations against the Appellant leaves him unable to meaningfully challenge the credibility and reliability of that information.

[140] Mr. Brar claims that while classified information was disclosed to the *Amici*, who are permitted to make *ex parte* submissions on the merits, this is of no consolation because while they have seen the redacted information, the *Amici* are unable to effectively communicate with the Appellant in order to obtain information that would allow them to challenge its reliability.

Mr. Brar maintains that much of the information relied upon by the Minister must be, in accordance with *Harkat*, withdrawn, or a stay of proceedings entered. If the information is withdrawn, there remains no basis upon which the Minister's decision can be sustained. Even if the information is not withdrawn, Mr. Brar believes that the decision to place his name on the no-fly list, and to maintain his listing, is unreasonable.

[141] Mr. Brar claims that he was not provided with the incompressible minimum of disclosure. He alleges that while the lifts or partial lifts of redactions over various pieces of information may result in better informing him of the Minister's case, the current state of disclosure fails to provide sufficient information for him to know the case to meet and the practical ability to meet that case. He explains that because the origins or sources of information found in various memoranda, case briefs, and summaries that purportedly link him to terrorist activities and financing are not disclosed, he cannot meaningfully rebut the Minister's case and directly dispute the reliability of the information against him. Mr. Brar believes that this lack of information has fatally compromised his ability to meaningfully contest the reliability of the information relied upon by the Minister and fails to provide him with the practical ability to contest the "reasonable suspicion" the Minister claims in order to maintain the SATA listing.

[142] Mr. Brar states that he was not provided with any information to support the reliability of the conclusory statements that apparently implicate him in terrorist activities. He relies on a passage from *Harkat* at paragraph 54 to affirm that the right to know the case to meet encompasses the right to "know the essence of the information and evidence supporting the allegations." Mr. Brar is of the opinion that he knows nothing about the evidence supporting the

allegations against him and maintains that the information emanating from unknown sources appears to be the lynchpin of the Minister's case. He states that this is demonstrated by the following portions of the December 2018 Ministerial memorandum, under the heading "Analysis":

> (1) An unattributed source described the appellant as President of the ISYF's youth wing in Canada (p. 337);
>
> (2) An unnamed source said that the appellant is collecting funds from members of the Sikh community to renovate Gurdwaras and diverting a major part of the funds for anti-India activities;
>
> (3) An unnamed source said that the appellant was involved in collecting funds and transferring them to his father and another individual for distribution to terrorist families;
>
> (4) An unnamed source claims that the appellant is closely associated with a number of Canada-based Sikh radical elements, and that the appellant had tasked Mr. Cheema to arrange to obtain arms and ammunition in India (p. 338); and
>
> (5) An unnamed source claims that the appellant has been planning an India-based terrorist attack with Mr. Cheema.

[143] Mr. Brar is of the opinion that this lack of disclosure of any information as to the nature or circumstances of the unknown sources is troubling since it reduces the appeal to a form of stalemate where the Appellant denies involvement with terrorist organizations and the Minister says, based on an unknown source, that he is involved. With this complete lack of detail, Mr. Brar is not in a position to reasonably challenge these assertions, which are central to the Minister's case.

[144] Mr. Brar states that he does not know the nature of the sources said to implicate him in terrorist activities and he is concerned with the frailties of relying on international intelligence

agencies or confidential informant information. He believes that factors crucial in assessing the reliability of a confidential source of information cannot be assessed when the identity of the source is unknown. He asserts that the unknown sources of information are completely devoid of predictive information and there is no indication that the source or sources have been "sufficiently corroborated".

[145] Mr. Brar submits that the "large amount of additional evidence on the reliability and credibility" relied upon by the CSIS witness in the case briefs raises further problems because none of this "additional information was provided to the decision maker and some of it was unknown to the Court prior to the witnesses' testimony." More importantly, Mr. Brar maintains that he was not provided with any of this additional information, not even in summary form. All he is left with is evidence that CSIS holds the subjective belief that the information implicating him is credible and reliable. Without disclosure as to why CSIS considers the information credible and reliable, Mr. Brar argues that he is unable to meaningfully contest or rebut that belief.

[146] In all these circumstances, Mr. Brar maintains that he was not provided with the incompressible minimum disclosure and as a result, he has not been reasonably informed of the case against him. He submits that this has resulted in a violation of his constitutional right to a fair process under section 7 of the *Charter* and requests that this Court allow the appeal and remove his name from the SATA list.

[147] Mr. Brar submitted an amended notice of constitutional question on January 31, 2022, in which he states that paragraph 8(1)(b) of the SATA [further] violates section 7 of the *Charter* because it is overbroad. However he did not provide any arguments in support of this position in his submissions, and informed this Court at the public hearings in Vancouver on April 21, 2022, that he was not pursuing the amended constitutional question relating to section 7 (overbreadth) nor section 6 (mobility rights) of the *Charter*. As a result, the issue of overbreadth is not addressed in this decision and that of mobility was only considered in Mr. Dulai's case.

(2) Submissions of Mr. Dulai

[148] Mr. Dulai submits that the SATA proceedings have failed to meet the minimum standards of procedural fairness. He alleges that the Minister's delegate violated his procedural fairness rights during the administrative recourse process by failing to give him adequate notice of the case to meet before requiring his response, and by failing to provide reasons for his decision to maintain his name on the no-fly list.

[149] Mr. Dulai affirms that nothing in the unclassified summary gave him any insight into whether he had been listed pursuant to paragraph 8(1)(a) or paragraph 8(1)(b) of the SATA. Indeed, the Minister failed to particularize whether he suspected that he would engage in an act that threatened transportation security (paragraph 8(1)(a)) or whether he would travel by air for the purpose of committing a terrorism-related offence (paragraph 8(1)(b)) until the appeal process was well underway. As a result, Mr. Dulai is of the opinion that the Minister's failure to particularize which prong of section 8 of the SATA he was relying on, until directed to do so by

this Court, breached his right to notice of the allegations against him and he seeks a declaration from the Court to this effect.

[150] Mr. Dulai also submits that the Minister committed a further breach of his procedural fairness rights by failing to provide reasons for his decision to deny his application for recourse and maintain his name on the SATA list. He claims that the one-page letter signed by the Minister's delegate was devoid of both the "what" and the "why" required to satisfy his right to reasons for the Minister's decision under section 15 of the SATA. This argument is addressed in the Dulai Reasonableness Decision at paragraph 95 and under the section entitled "The SATA needs improvement" at page 63. Furthermore, the Minister's reasoning process and the information he considered to reach his decision remain unclear even with the expanded disclosure provided after Mr. Dulai filed his appeal.

[151] Mr. Dulai seeks a declaration that upon receipt of an application for recourse, the Minister must provide a listed person with notice of the basis for the person's listing – i.e., whether the listing is under paragraph 8(1)(a) or 8(1)(b), or both – in addition to a copy of all unclassified information relied upon by the Minister to list the person. Mr. Dulai also solicits a declaration that the Minister must provide the listed person with written reasons on an application for recourse that explain the decision and the rationale behind it. These arguments are also addressed in the Dulai Reasonableness Decision under the section entitled "The SATA needs improvement" at page 63.

[152] Similarly to Mr. Brar, Mr. Dulai submits that due to national security concerns, he was not given the incompressible minimum amount of disclosure necessary for him to know and meet the Minister's case. He states that the evidence and allegations at the heart of the Minister's decision have been almost entirely withheld from him. He notes that most of the information in the unclassified summary that was relied upon to justify his placement on the no-fly list comes from open source material. Moreover, the PPIO memorandum that forms the reasons for the Minister's decision to maintain his name on the no-fly list replicates the CSIS brief and unclassified summary and summarizes the information that he provided himself. The redacted portions are either not summarized at all, or summarized with general statements.

[153] Mr. Dulai also refers to other information in the appeal book, such as Ms. Soper's affidavits that he claims provide no information about the evidence against him. He submits that affidavits of other government officials also do not provide him with any information capable of assisting him in being informed of the case against him.

[154] As for the Public Communications issued from the Court, Mr. Dulai says he has received summaries generally describing what was discussed in the *ex parte* and *in camera* proceedings but not the nature, credibility, or reliability of the redacted information related to him.

[155] Mr. Dulai is of the opinion that the disclosure provided does not elevate the allegations against him from general to specific and does not allow him to know the essence of the information and evidence said to support those allegations. As a result, he is unable to give meaningful instructions to his counsel about what information and evidence to adduce in his

defence. He is also unable to know what evidence or guidance to give the *Amici* that would allow them to rebut the redacted information in a meaningful way. Mr. Dulai states that fairness requires that he be informed of the grounds for the Minister's rejection of his evidence regarding the serious allegations against him, but that the redactions make this impossible. For these reasons, he requests that the Minister withdraw the information that cannot be disclosed. Failing that, Mr. Dulai submits that the proceedings will remain unfair and violate natural justice and his rights under section 7 of the *Charter*.

[156] Mr. Dulai claims that there has not been a substantial substitute for the receipt of his full disclosure or full participation in his appeal. He submits that the failure of Parliament to include a provision permitting the appointment of special advocates violates section 7 of the *Charter*, as the inherent limits of the *Amici*'s mandate have unfairly restricted their ability to advocate for Mr. Dulai in the closed proceedings. In his view, given the insufficient disclosure, he has not been able to provide meaningful guidance and information to the *Amici*.

[157] Mr. Dulai additionally submits that the unavailability of special advocates in the SATA proceedings renders the regime unconstitutional under section 7 because it fails to provide the listed person with a substantial substitute for full disclosure and full participation in the appeal. He adds that the SATA permits the Government to label Canadian citizens as terrorists and restrict their rights and freedoms based on the reasonable suspicion standard (lower than the reasonable grounds required under the IRPA) that can be based on evidence that the listed person never gets to see. Moreover, the Government gets the opportunity to convince the designated judge that this secret evidence is trustworthy and accurate in hearings the listed person is not privy to.

[158] Because of the reasons enumerated above, Mr. Dulai seeks a declaration from this Court that the SATA is unconstitutional to the extent that it deprives the designated judge of the ability to appoint special advocates, and an order that the *Amici* be permitted to act as special advocates for the remainder of the proceedings.

[159] In his Notice of Appeal dated April 18, 2019, Mr. Dulai also argued that the Minister's decision to designate him as a listed person, and thereafter maintain that designation upon administrative review, violated and disproportionately impacted his rights under subsections 2(a), 2(b) and 2(d) as well as section 15 of the *Charter*. However, Mr. Dulai did not cite any matter connected to sections 2 and 15 of the *Charter* when he submitted his Notice of Constitutional Question with this Court on April 25, 2019, and he did not do so during the public hearings in April 2022. As a result, this ruling does not address issues related to sections 2 and 15 of the *Charter*.

(3) Submissions of the Respondent

[160] Although both Appellants filed a Notice of Constitutional Question, the Minister states that their submissions do not argue that the provisions of the SATA scheme are unconstitutional. The Minister argues that the focus of their argument is that the conduct of the recourse and appeal proceedings applicable to their SATA listing violated their section 7 *Charter* rights. Where administrative action under a piece of legislation is the cause of a right infringement, it is clear that the action should be challenged, not the legislation. The Respondent submits that the appropriate focus is the particular conduct in the Appellants' cases, not the scheme itself.

[161] The Minister alleges that in Mr. Dulai's appeal, the only declaration he seeks is that the SATA violates section 7 of the *Charter* to the extent that it does not permit the appointment of a special advocate. The Minister, however, does not believe that section 7 is engaged in either of the two cases.

[162] In Mr. Brar's case, the Minister submits that the right to security of the person does not protect an individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer because of Government action. The Minister states that Mr. Brar has failed to disclose or provide details of any specific psychological effects, which he describes as disturbing and profound. His claim does not share commonality with the circumstances in *Charkaoui I* where the concern was the "irreparable harm" an individual subject to a security certificate would face because of deportation from Canada.

[163] As for Mr. Dulai, the Minister argues that the description of psychological impact in his affidavit does not rise to the level of "a serious and profound effect on the psychological integrity." The "extreme embarrassment and distress" he describes do not share commonality with the circumstances in *Charkaoui I*.

[164] Should the Court find that Mr. Brar and Mr. Dulai's section 7 rights are engaged, the Minister still believes that the Appellants have failed to satisfy the second part of the section 7 test because the SATA proceedings are conducted in accordance with the principles of fundamental justice. The Minister refers to *Harkat* in the security certificate context to support his argument, stating that the principles of fundamental justice include two interrelated aspects of

the right to a fair process: 1) the right to know and meet the case; and 2) the right to have a decision made by the judge on the facts and the law. The Minister points out that the assessment of whether a process is fair must take into account the legitimate need to protect information and evidence that is critical to national security.

[165] The Court stated in *Ruby v Canada* (Solicitor General), 2002 SCC 75 [*Ruby*] that "in such circumstances, fairness is met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal" (para 40). The Minister states that procedural fairness requires sufficient, not perfect, disclosure of the case to meet. It does not require the disclosure of all information considered by the decision maker. For this reason, the Minister believes there was no breach of procedural fairness in the recourse proceedings and that the unclassified summaries were sufficient to permit both Mr. Brar and Mr. Dulai to participate meaningfully in the recourse process. For example, in response to the disclosure of the unclassified summary, Mr. Dulai provided detailed submissions dated January 2, 2019, with supporting documents. He was able to address each allegation in the unclassified summary specifically.

[166] The Minister states that Mr. Dulai's request for a declaration that the Minister must provide written reasons on a recourse application is also inappropriate under the SATA scheme. The Minister's delegate provided notice of the decision, which included some of the rationale. Mr. Dulai's complaint is in essence about the adequacy of the reasons. The Minister submits that, as held by the SCC in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 21 and 22, (in)adequacy of reasons does

not amount to a breach of procedural fairness, but is considered a factor when assessing the reasonableness of the decision maker's reasoning.

[167] According to the Minister, if the Court determines that procedural fairness required reasons in the recourse decision, and that the decision dated January 30, 2019 was lacking, then the reasons requirement was met by the PPIO's Memorandum to the Minister's Delegate. The SCC has recognized that the requirement to provide written reasons for a decision can be fulfilled by accepting the use of the notes of the subordinate reviewing officer as part of the flexibility that is necessary when the courts balance the requirements of the duty of fairness with the recognition of the day-to-day realities of administrative agencies, and the many ways principles of procedural fairness can be upheld (see *Baker v Canada* (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 44). This matter was dealt with in the two Reasonableness Decisions under the section entitled "*The scope of the public evidence resulting from the appeal proceedings*" (see Brar at p 39 and Dulai at p 37).

[168] The Minister argues that there is no breach of the duty of fairness to provide reasons in the absence of any request for written reasons. Mr. Dulai did not submit any evidence that he made such a request for reasons before he filed his Notice of Appeal.

[169] The Minister submits that the appeal proceedings provide an incompressible minimum disclosure and that the Appellants have received sufficient disclosure to be reasonably informed of the case against them, and to give instructions to their counsel. Procedural fairness requires

sufficient, not perfect, disclosure of the case to meet. It does not require the disclosure of all information considered by the decision maker.

[170] The Minister argues that Mr. Brar has had a meaningful opportunity to participate in the process through the involvement of the *Amici* in the *ex parte* and *in camera* proceedings. Mr. Brar was also able to make submissions on preliminary legal issues, file evidence through his affidavit (108 pages), make written representations on the substantive merits of the appeal (43 pages), conduct examination and cross-examination of the Respondent's affiants, and make oral submissions at the public hearings.

[171] The Minister believes that based on all of the information disclosed to Mr. Dulai in these proceedings, Mr. Dulai has received sufficient disclosure to be reasonably informed of the case against him, and to give instructions to his counsel. He has had a meaningful opportunity to participate through the involvement of the *Amici* in the *ex parte* and *in camera* proceedings, in addition to making submissions on preliminary legal issues, filing evidence through his affidavit (471 pages), making written representations on the substantive merits of the appeal (91 pages), conducting examination and cross-examination of the Respondent's affiants, and making oral submissions at the public hearings. In fact, in response to the release of the unclassified summary, Mr. Dulai was able to offer thorough responses (January 2, 2019) with supporting documents addressing each allegation.

[172] The Minister is convinced that the appeal proceedings have been conducted in accordance with the principles of fundamental justice.

[173] The Minister states that in its determination of the preliminary legal issues, the Court established that the SATA's appeal mechanism requires the designated judge to play the essential role of protecting Canada's national security interests and ensuring a fair judicial process. Consistent with this duty, the Court appointed two *Amici* to provide a substantial substitute for the full disclosure and participation of the Appellants. While the *Amici* did not have a mandate to act as counsel for Mr. Dulai and Mr. Brar, they were required to represent the interests of the Appellants.

[174] The Minister believes that contrary to Mr. Dulai's argument, the appointment and mandate of the *Amici* in these proceedings ensured procedural fairness to both Appellants and assisted the Court in performing its statutory obligations under the SATA. In *Charkaoui I* and *Harkat*, the SCC did not dictate that special advocates were the only substantial substitutes in the context of national security cases. As noted by the Court in these proceedings, the appointment of *Amici* in national security proceedings is well-established. The Court regularly resorts to them in designated proceedings to ensure a full and fair hearing of issues when those issues cannot be addressed publicly.

IX. Analysis: Section 7 of the *Charter*

A. *Legislation*

(1) Section 7 of the *Charter*

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in	7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en

accordance with the principles of fundamental justice.

conformité avec les principes de justice fondamentale.

(2) Sections 15 and 16 of the SATA

Application to Minister

15 (1) A listed person who has been denied transportation as a result of a direction made under section 9 may, within 60 days after the day on which they are denied transportation, apply in writing to the Minister to have their name removed from the list.

Demande de radiation

15 (1) La personne inscrite ayant fait l'objet d'un refus de transport à la suite d'une directive donnée en vertu de l'article 9 peut, dans les soixante jours suivant le refus, demander par écrit au ministre que son nom soit radié de la liste.

Exceptional circumstances

(2) If the Minister is satisfied that there are exceptional circumstances that warrant it, the Minister may extend the time limit set out in subsection (1).

Prolongation

(2) Le ministre, s'il est convaincu qu'il existe des circonstances exceptionnelles le justifiant, peut prolonger le délai visé au paragraphe (1).

Representations

(3) The Minister must afford the applicant a reasonable opportunity to make representations.

Observations

(3) Le ministre accorde au demandeur la possibilité de faire des observations.

Application to Minister

(4) On receipt of the application, the Minister must decide whether there are still reasonable grounds to maintain the applicant's name on the list.

Décision du ministre

(4) À la réception de la demande, le ministre décide s'il existe encore des motifs raisonnables qui justifient l'inscription du nom du demandeur sur la liste.

Notice of decision to applicant

(5) The Minister must give notice without delay to the applicant of any decision made in respect of the application.

Avis de la décision au demandeur

(5) Le ministre donne sans délai au demandeur un avis de la décision qu'il a rendue relativement à la demande.

Deemed decision

(6) If the Minister does not make a decision in respect of the application within a period of 120 days after the day on which the application is received — or within a further period of 120 days, if the Minister does not have sufficient information to make a decision and he or she notifies the applicant of the extension within the first 120-day period — the Minister is deemed to have decided to remove the applicant's name from the list.

Présomption

(6) S'il ne rend pas sa décision dans les cent vingt jours suivant la réception de la demande ou dans les cent vingt jours suivant cette période s'il n'a pas suffisamment de renseignements pour rendre sa décision et qu'il en avise le demandeur durant la première période de cent vingt jours, le ministre est réputé avoir décidé de radier de la liste le nom du demandeur.

Appeals

Appel

Decisions under this Act

Décisions au titre de la présente loi

16 (1) This section applies in respect of any appeal of any direction made under section 9 and any decision made under section 8 or 15 by the Minister.

16 (1) Le présent article s'applique à toute demande d'appel d'une directive donnée en vertu de l'article 9 et d'une décision du ministre prise au titre des articles 8 ou 15.

Application

(2) A listed person who has been denied transportation as a result of a direction made under section 9 may appeal a decision referred to in section 15 to a judge within 60 days after the day on which the notice of the decision referred to in subsection 15(5) is received.

Demande

(2) La personne inscrite ayant fait l'objet d'un refus de transport à la suite d'une directive donnée en vertu de l'article 9 peut présenter à un juge une demande d'appel de la décision visée à l'article 15 dans les soixante jours suivant la réception de l'avis visé au paragraphe 15(5).

Extension

(3) Despite subsection (2), a person may appeal within any further time that a judge may,

Délai supplémentaire

(3) Malgré le paragraphe (2), une personne peut présenter une demande d'appel dans le délai supplémentaire qu'un

before or after the end of those 60 days, fix or allow.

Determination

(4) If an appeal is made, the judge must, without delay, determine whether the decision is reasonable on the basis of the information available to the judge.

Removal from list

(5) If the judge finds that a decision made under section 15 is unreasonable, the judge may order that the appellant's name be removed from the list.

Procedure

(6) The following provisions apply to appeals under this section:

(a) at any time during a proceeding, the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(b) the judge must ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or

juge peut, avant ou après l'expiration de ces soixante jours, fixer ou accorder.

Décision

(4) Dès qu'il est saisi de la demande, le juge décide si la décision est raisonnable compte tenu de l'information dont il dispose.

Radiation de la liste

(5) S'il conclut que la décision visée à l'article 15 n'est pas raisonnable, le juge peut ordonner la radiation du nom de l'appelant de la liste.

Procédure

(6) Les règles ci-après s'appliquent aux appels visés au présent article :

a) à tout moment pendant l'instance et à la demande du ministre, le juge doit tenir une audience à huis clos et en l'absence de l'appelant et de son conseil dans le cas où la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

b) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui,

endanger the safety of any person;

à la sécurité nationale ou à la sécurité d'autrui;

(c) throughout the proceeding, the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

c) il veille tout au long de l'instance à ce que soit fourni à l'appelant un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'appelant d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

(d) the judge must provide the appellant and the Minister with an opportunity to be heard;

d) il donne à l'appelant et au ministre la possibilité d'être entendus;

(e) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

e) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

(f) the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant;

f) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'appelant;

(g) if the judge determines that information or other evidence provided by the Minister is not relevant or if the Minister withdraws the information or evidence, the judge must not base a decision on that

g) s'il décide que les renseignements et autres éléments de preuve que lui fournit le ministre ne sont pas pertinents ou si le ministre les retire, il ne peut fonder sa décision sur ces renseignements ou ces

information or other evidence and must return it to the Minister; and	éléments de preuve et il est tenu de les remettre au ministre;
(h) the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.	**h)** il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance.
Definition of *judge*	**Définition de *juge***
(7) In this section, *judge* means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.	**(7)** Au présent article, *juge* s'entend du juge en chef de la Cour fédérale ou du juge de cette juridiction désigné par celui-ci.

B. *Jurisprudential teachings on section 7 analysis involving national security issues*

[175] Section 7 of the *Charter* guarantees the right to life, liberty and security of the person and contains a built-in safeguard for those rights, stating that they can only be encroached upon in accordance with the principles of fundamental justice. These rights apply to all people within Canada, not only to Canadian citizens. In order to trigger a section 1 analysis, the Appellants must show that:

i. There has been or could be an infringement to the right to life, liberty and security of the Appellants, and

ii. The infringement is not in accordance with the principles of fundamental justice.

[176] If both elements are proven, the Minister then has the burden to show that the infringement was subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter* (see *Charkaoui I* at para 12).

[177] In *Harkat*, referring to *Charkaoui I*, the SCC stresses that "[l]aws that interfere with these interests must conform to the principles of fundamental justice. If they fail to do so, they breach s. 7 of the *Charter* and fall to be justified under s. 1 of the *Charter*" (para 49).

[178] As explained by the SCC, the principles of fundamental justice are,

> the basic principles that underlie our notions of justice and fair process. These principles include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security (*Charkaoui I* at para 19).

[179] Section 7 is not concerned with whether a limit imposed on a *Charter* right is justified; that analysis is undertaken under section 1. Rather, section 7 is concerned with whether the limit has been implemented in a way that is consistent with natural justice principles. Both *Charkaoui I* and *Harkat* expand on this notion:

> [21] Unlike s. 1, s. 7 is not concerned with whether a limit on life, liberty or security of the person is justified, but with whether the limit has been imposed in a way that respects the principles of fundamental justice. Hence, it has been held that s. 7 does not permit "a free standing inquiry into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general" (*Malmo-Levine*, at para. 96). Nor is "achieving the right balance . . . itself an overarching principle of fundamental justice" (ibid.). As the majority in *Malmo-Levine* noted, to hold otherwise "would entirely collapse the s. 1 inquiry into s. 7" (ibid.). This in turn would relieve the state from its burden of justifying intrusive measures, and require the *Charter* complainant to show that the measures are not justified. (*Charkaoui I*)
>
> [43] Full disclosure of information and evidence to the named person may be impossible. However, the basic requirements of procedural justice must be met "in an alternative fashion appropriate to the context, having regard to the government's objective and the interests of the person affected": *Charkaoui I*, at para. 63. The alternative proceedings must constitute a substantial substitute to full disclosure. Procedural fairness does not require a

> perfect process — there is necessarily some give and take inherent in fashioning a process that accommodates national security concerns: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at para. 46. (*Harkat*)

[180] My task is to identify the limits, if any, imposed on section 7 rights by the SATA to persons on the list, evaluate the seriousness of these limits and assess whether or not the SATA offers a procedure that is fair, keeping in mind the particular circumstances and the consequences of the intrusion on life, liberty or security.

C. *The necessity to abide by the principles of fundamental justice*

[181] In *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 [*Toronto Star*], a decision dealing with freedom of expression, Justice Fish commented on the importance of justice being exercised in public in order for decisions to be understood and complied with: “In any constitutional climate, the administration of justice thrives on exposure to light and withers under a cloud of secrecy” (para 1). In that same decision, he recognized the need to adjust this “exposure to light” in certain exceptional cases:

> [3] The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

[182] In the two current appeals, some information must remain concealed from the Appellants and the public to protect Canada’s national security and intelligence. In this context, this Court must use a contextual approach to respect principles of natural justice, especially when dealing

with concepts that create a tension, as it is the case with national security and individual rights. In Charkaoui v Canada (Citizenship and Immigration), 2008 SCC 38 [Charkaoui II] , Justices Lebel and Fish stressed the importance of procedural fairness in cases where rights protected by section 7 of the Charter are concerned:

> [56] In *La* (at para. 20), this Court confirmed that the duty to disclose is included in the rights protected by s. 7. Similarly, in *Ruby v Canada (Solicitor General)*, 2002 SCC 75, at paras. 39-40, the Court stressed the importance of adopting a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled. In our view, the issuance of a certificate and the consequences thereof, such as detention, demand great respect for the named person's right to procedural fairness. In this context, procedural fairness includes a procedure for verifying the evidence adduced against him or her. It also includes the disclosure of the evidence to the named person, in a manner and within limits that are consistent with legitimate public safety interests.
>
> [57] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para. 113, concerned the nature of the right to procedural fairness in a context where a person had been deprived of rights protected by s. 7 of the *Charter*. This Court emphasized the importance of being sensitive to the context of each situation:
>
> > [D]eciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself . . . . [para. 115]

[183] In essence, analyzing a situation through section 7 of the *Charter* does not require a specific or perfect process but one that is fair and takes the nature of the proceedings and the interests at stake into consideration, as discussed in *Charkaoui I* at paragraphs 19 and 20, and in *Harkat* at paragraph 43. The right to full knowledge of the case is not absolute and some give and take is unavoidable in designing a process that addresses national security issues.

[184] Summarily, the question before this Court is whether being listed on the no-fly list and restriction on air travel is attenuated by the SATA's administrative review and appeal mechanism that provide appellants with a process that takes into account the imperative of protecting national security information. Answering this question will be indicative of whether the two Appellants were afforded a process that meets the principles of fundamental justice which requires that:

1) There is a fair hearing;
2) The hearing is presided by an independent, impartial magistrate who decides on the facts and the law;
3) The Appellants have a right to know the case made against them; and
4) The Appellants have a right to answer that case in such a way as to give counsel knowledgeable instructions (see *Harkat* at paras 41-43).

[185] In the following paragraphs, I will discuss all of those matters keeping in mind the process followed in both *Charkaoui I* and *Harkat*.

(1) Is section 7 of the *Charter* engaged?

[186] When a Canadian citizen or permanent resident becomes informed that they cannot fly due to their named status, and are incidentally suspected of posing a threat to air travel because of their ties to terrorist activities, their right to security, as understood under section 7 of the *Charter*, is curtailed for the following reasons.

[187] Having a named status does not project a positive image and may hamper a person's life. For example, the dissemination of the SATA list to all air carriers that fly into, out of, and within Canada, and consequently being denied boarding, can jeopardize the listed person's reputation and security. When a listed person files an administrative review or an appeal, their identity becomes public and the publicity that emerges as the case progresses inevitably connects them to air safety and terrorism. This has a negative influence on the listed person's reputation and can trigger security issues for them and their family. In the current appeals, media outlets produced articles disclosing the names and personal details of the Appellants, making them publicly known (see Revised Appeal Books at pp 341-342 (Brar) and at pp 323-324 (Dulai)). This negative publicity has seriously impacted the lives of both Appellants and their families.

[188] The Appellants' section 7 *Charter* rights have been impacted in that being publicly associated with being a terrorist or related to terrorist activities can only contribute to a "direct loss of psychological integrity", a recognized section 7 interest (see *Sogi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1429 at paras 52-54). As Justice Mackay noted, such "… psychological distress caused to him by the state's action of detaining him [not the case here] and

labelling him a terrorist deprives him of the right to security of the person protected by section 7 of the *Charter*." Furthermore, the SCC said in *Charkaoui I* that accusing someone of being a terrorist can cause "irreparable harm to an individual" (para 14).

[189] There is no question that the lives of the Appellants have been affected as a result of being associated with terrorism and terrorist activities (see Brar affidavit at paras 62-64 and Dulai affidavit at paras 119-133). The Respondent minimizes the consequences on the respective lives of the Appellants as described therein by arguing that simply being labelled as associated with terrorist activities is not sufficient to engage section 7. I do not agree. To be labelled a terrorist in Canada or around the world is extremely damaging to one's reputation and living with such a cloud over one's head can only be psychologically harmful and difficult to live with. Contrary to the Minister's submissions, a psychological report is not essential to capture this. I am satisfied that the Appellants' section 7 *Charter* security of the person right is adversely affected.

[190] Notwithstanding what has been said, the Appellants' specific circumstances need to be taken into consideration. In the two cases at issue, the impact of the SATA on the Appellants' section 7 rights is not the same as if they had been jailed, released with strict conditions, or facing deportation to oppressive countries (as was the case in the certificate proceedings pursuant to the IRPA in *Charkaoui I* and *Harkat*). The restriction on air transportation, the psychological distress caused by being listed on the no-fly list, and the information being publicly revealed has had an impact on their daily security, and the hardship they are experiencing is real; however, it is not as severe as it would be for a named person in a certificate proceeding. As a result, section

7 rights, particularly “security of the person,” have been compromised, though to a lesser degree than in *Harkat*.

[191] The question I need to answer is whether the process in place is such that the limits on section 7 rights comply with the principles of fundamental justice, or not. In order to fully understand the process in place, it is important to review the role of the designated judge in SATA appeals. Such a role, as evidenced in the reasons published in *Brar 2020* at paragraphs 89-127, is analogous to the one of the designated judge in the IRPA certificate processes. Former Chief Justice McLachlin spoke openly and enthusiastically about the designated judge position in both *Charkaoui I* (paras 32-64) and *Harkat* (para 46). As previously stated, such a function was intended to be a crucial component in guaranteeing procedural fairness in certificate processes. It is also important to examine the *Amici*’s role and mandate. Finally, the SATA appeal procedure must be looked at to see if the right to a fair hearing is provided for.

(2) The role of the designated judge

[192] The designated judge presiding the SATA appeal has a gatekeeper role to play (*Brar 2020* at paras 89-139). The SCC identified and developed this role in *Charkaoui I* and *Harkat.* As discussed in the *Brar 2020* reasons, the IRPA certificate and the SATA proceedings are comparable and in both pieces of legislation, the role of the designated judge is identical. Therefore, the role assigned to the designated judge by the SCC in the IRPA is one that is relevant to the designated judge in the SATA. In the *Brar 2020* decision, I explained that the role of the designated judge in the IRPA extended to the SATA when *ex parte* and *in camera* hearings were held (paras 95 and 100). The SCC commented on this concept in both *Charkaoui I*

and *Harkat,* and Justice Mosley made mention of it in *X (Re)*, 2017 FC 136 at paras 31-32 in the context of privilege claims pursuant to section 18.1 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23:

> [31] The designated judge plays an expanded gatekeeper role in national security matters because he or she bears wider responsibilities, due to the confidential and closed nature of the proceedings. Both the jurisprudence and the legislation establish the responsibilities of the designated judge, notably the Supreme Court's *Harkat* decision in 2014 and the IRPA. The Supreme Court provided a useful synopsis of these responsibilities at paragraph 46 of *Harkat 2014*:
>
> [Citation omitted.]
>
> [32] Given that the designated judge's duties, as elaborated above, stem from an overriding responsibility to ensure fairness and the proper administration of justice, such duties are not limited to security certificate proceedings. The distinction between the responsibilities of the designated judge, *amici curiae*, and special advocates extends beyond certificate proceedings and applies to all relevant situations in the field of national security where confidential information and CSIS human source issues can arise. […]

[193] In *Charkaoui I*, the SCC noted that the designated judge is "the only person capable of providing the essential judicial component of the process" (para 34) and must assume an "active role" (para 39), and the designated judge must not be a "rubber stamp" (para 41) but must instead be "non-deferential" (para 42). This function is critical in ensuring that a judge's independence and impartiality are not jeopardized by appearing unduly subservient to the Government's stance (paras 39-42). As such, the active interventionist role and the heightened ability to skeptically scrutinize and vet evidence certifies that the designated judge is able to make decisions based on the facts and the law (paras 48-52).

[194] This active interventionist role assigned to designated judges remained important even with the involvement of the special advocate in *ex parte* and *in camera* hearings. In *Harkat*, where the special advocate role was found to be a substantial substitute to ensure procedural fairness, former Chief Justice McLachlin, on behalf of the Court, commented on the role of the designated judge:

> [46] First, the designated judge is intended to play a gatekeeper role. The judge is vested with broad discretion and must ensure not only that the record supports the reasonableness of the ministers' finding of inadmissibility, but also that the overall process is fair: ". . . in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case" (C. Forcese and L. Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007) (online), at p. 60). Indeed, the IRPA scheme expressly requires the judge to take into account "considerations of fairness and natural justice" when conducting the proceedings: s. 83(1)(a), IRPA. The designated judge must take an interventionist approach, while stopping short of assuming an inquisitorial role.

[195] Even with the involvement of a special advocate, the SCC considers that the designated judge still has a duty to ensure fair proceedings. They must do so while also protecting national security and ensuring the safety of any person, even to the point of declaring a violation of the right to a fair trial when necessary: "If [the discretion and flexibility to fashion a fair process] is impossible, judges must not hesitate to find a breach of the right to a fair process and to grant whatever remedies are appropriate, including a stay of proceedings" (*Harkat* at para 4).

[196] In my capacity as a gatekeeper, and in accordance with my responsibilities to maintain fairness in the process, I appointed two *Amici* to ensure they could adequately represent the two

Appellants' individual interests. Because the SATA lacks the participation of a special advocate as required in the IRPA, I revised the *Amici*'s initial mandate after the *Brar 2020* ruling. In doing so I reconsidered the *Charkaoui I* decision in which the SCC, in order to ensure the principles of natural justice would be respected, contemplated possible options for substantial substitutes. For instance, former Chief Justice McLachlin made reference, in *Charkaoui I*, to the Arar Commission, drawing attention to the use of special counsel to assist with intelligence and national security matters:

> [79] The Arar Inquiry provides another example of the use of special counsel in Canada. The Commission had to examine confidential information related to the investigation of terrorism plots while preserving Mr. Arar's and the public's interest in disclosure. The Commission was governed by the CEA. To help assess claims for confidentiality, the Commissioner was assisted by independent security-cleared legal counsel with a background in security and intelligence, whose role was to act as *amicus curiae* on confidentiality applications. The scheme's aim was to ensure that only information that was rightly subject to national security confidentiality was kept from public view. There is no indication that these procedures increased the risk of disclosure of protected information.

[197] The process to amend the *Amici*'s mandate went beyond a review of the jurisprudence. I also canvassed the Hansards at the time the SATA legislation was under review. Following that, I noted that the Minister of Public Safety and Emergency Preparedness and his officials responded to the lack of a special advocate in the SATA appeal procedure by stating that the presiding judge may appoint an *amicus curiae* if the situation justified it:

> **Senate -Standing Senate Committee on National Security and Defense - May 28, 2015**
>
> John Davies, Director General, National Security Policy, National and Cyber Security Branch, Public Safety Canada: Yes, and it's the judge's discretion to appoint an amicus if the judge feels it's

> important for the case and due process in the case. There's a big distinction in the immigration setting between the rights and needs of someone who faces detention, deportation and potentially further mistreatment, versus the access to a passport or, in a similar case, the ability to board a plane under the Passenger Protect Program. There's a different series of rights invoked here.
>
> Ritu Banerjee, Director, Operational Policy and Review, Public Safety Canada: The minister has an obligation to provide all the information. That's part of procedural fairness and natural justice obligations.
>
> On the second point, the judge can always seek an *amicus curiae* instead of a special advocate.
>
> **Senate - Standing Senate Committee on National Security and Defense - April 10, 2019**
>
> Minister R. Goodale: […] It's my understanding that if a judge in those circumstances feels that the help of some kind of *amicus* would be appropriate, the judge can require that. I believe that is in existing law.
>
> It would really fall to the presiding justice to determine whether or not the assistance of a special advocate or some other friend of the court would be necessary in order to ensure that the proceeding was, in fact, fair to those who are before the judge.
>
> Mr. Doug Breithaupt, Director and General Counsel, Criminal Law Policy Section *(Department of Justice Canada)*: Just to confirm that the Federal Court has the ability to appoint an *amicus curiae* or friend of the court to assist in such proceedings if the Federal Court judge considered that such an appointment is warranted. That's the kind of decisions that they make.

[198] The *Amici*'s mandate, as revised and amended in July 2020, went as far as representing the interests of the Appellants during *ex parte* and *in camera* hearings. I also made sure that solicitor-client privilege would shield all of their communications with the Appellants. This amended mandate also required the *Amici* to assume the role of cross-examiner, which they dutifully fulfilled, at times triggering objections from the Attorney General's counsel. From my

experience in two certificate proceedings, presiding over several *ex parte* and *in camera* proceedings, some involving *amici*, and assuming my role as gatekeeper and trustee for ensuring fairness, an adversarial atmosphere during the *ex parte* and *in camera* sessions ensured impartiality and fairness in the proceedings, exactly as I had intended.

(3) The role and mandate of the *Amici*

[199] In this section, I will look at whether the *Amici*'s roles and mandates in the cases at bar are a meaningful substitute to ensure compliance with principles of natural justice.

[200] The basic principles of natural justice require hearing presided over by an impartial, independent judge who will deliver a decision based on the facts and the law, as per *Charkaoui I* (paras 32-52) and *Harkat* (para 46). They also require that enough information be disclosed to allow the Appellants to understand the case against them, respond to it, and give directions to their counsel. As mentioned earlier, this is precisely the approach adopted by the SCC when it considered the constitutional validity of the IRPA certificate process in *Charkaoui I*:

> [29] This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.

[201] One of the questions to be answered as I comment on each of these facets is whether the *Amici'*s involvement in the appeal process is such that it is a valid substitute for ensuring that

natural justice standards are fulfilled. It will also allow me to comment on disclosure and whether it is sufficient to know the case and respond to it. Overall, the opinions on each of these points will assist me in making a determination on the constitutional issue.

(4) The right to a hearing

[202] The SATA legislation mandates a 90-day automatic review of the no-fly list to evaluate whether there are still the "grounds to suspect" for the individual to remain listed. The SATA list is updated on a regular basis, with some names being added and others being removed (Lesley Soper's first affidavit dated September 12, 2019 at paras 12, 23).

[203] The SATA also allows a listed person who was denied transportation to request an administrative review from the Minister of Public Safety and Emergency Preparedness, seeking that their name be removed from the list (section 15 of the SATA). The Minister may afford the listed person a reasonable opportunity to make representations and share a factual basis for the decision to allow the listed person to respond. This occurred in the case of both Appellants. The Minister then makes a decision determining whether there are reasonable grounds to keep the person's name on the list within 90 days (or longer if both the Minister and the named individual agree) (subsection 15(6) of the SATA).

[204] The SATA also provides a right of appeal to the listed individual, in which the Minister's decision is reviewed and a designated judge assesses if it was reasonable based on all the information presented (subsection 16(4) of the SATA).

[205] The appeal process in the current two cases resulted in the following:

- An opportunity to be heard was offered to both Appellants and the Minister (paragraph 16(6)(d) of the SATA), which resulted in 4-day public hearings held in Vancouver where 3 witnesses were heard and submissions were made;

- Upon request from the Minister, the holding of *ex parte* and *in camera* hearings (paragraph 16(6)(a) of the SATA) where witnesses and submissions were heard and case management issues dealt with;

- The issuance, by the designated judge, of 22 Public Communications providing summaries of *ex parte* and *in camera* hearings and disclosing information without jeopardizing national security or the safety of any person (paragraph 16(6)(c) of the SATA);

- The disclosure, through *ex parte* and *in camera* hearings, of more evidence than what was presented to the Minister for his decisions. This evidence, presented through examinations and cross-examinations by the Attorney General and the *Amici* was reliable and appropriate (sections 16(4) and 16(6)(e) of the SATA);

- The issuance of an Order and Reasons on October 5, 2021, that allowed more information to be disclosed to the Appellants through lifts agreed upon by the Attorney General and the *Amici,* and accepted by the designated judge. Public summaries ensuring that such disclosure did not jeopardize national security or endanger the safety of any person were also issued. As a result, a Revised Appeal Book comprising of all the disclosures,

summaries and remaining redactions was forwarded to all concerned on October 12, 2021;

- Public and confidential submissions were filed.

[206] The above list reveals without a doubt that the process has afforded the right to be heard.

(5) The impartial and independent judge

[207] The SATA specifically demands that the appeal process be presided over by a designated judge of the Federal Court and named by the Chief Justice (subsection 16(7) of the SATA) who in turn is appointed according to section 101 of the *Constitution Act, 1867*.

[208] This decision by the legislature ensures that the judge handling SATA appeals is knowledgeable on national security issues and that the unwritten constitutional principles of judicial independence are followed. Not only must the judge be independent and impartial in reality, but he or she must also appear to be independent and unbiased. Does the SATA create the impression that the appointed judge is biased and compromised? *Charkaoui I* at paragraphs 32 to 47 addresses this question in connection to the designated judge presiding over the IRPA certificate processes, a role that is comparable to that they have in SATA appeals.

[209] Because I was aware of the SCC's teaching in *Charkaoui I*, I took an active and non-deferential position throughout the proceedings. When I selected the *Amici* and envisioned and evaluated their role, I was also aware that the SATA did not provide for special advocates as it

does in the IRPA certificate procedures. I appointed the *Amici* because the designated judge must ensure a fair procedure, and I wanted to show that as a designated judge, I must not only be independent and impartial, but also appear to be as such. Their presence and participation in the *ex parte* and *in camera* sessions helped to make this a reality.

[210] This was important.

[211] As a result, I attributed to the *Amici* nearly all of the tasks assigned to special advocates under the IRPA certificate legislation. I instructed them to represent the Appellants' interests in both cases. They had discussions with the Appellants and were even granted an extension to do so. They would have been able to communicate with the Appellants again after seeing the confidential information, with this Court's leave, but no request was ever made. While I do not know if the Appellants took advantage of the opportunity to communicate with the *Amici* at any time, provided it was one-way communication that was protected by both solicitor-client and litigation privileges, this was an option available to them in the current proceedings.

[212] The *Amici* took part in full in the *ex parte* and *in camera* proceedings. They conducted lengthy cross-examinations of witnesses. There were objections to the breadth of their interrogation. They also raised issues of fact and law, some of which were novel, and during the confidential hearings, they provided confidential submissions that obviously put forward different points of view from that of the counsel for the Attorney General. The *Amici* were given the task of representing the Appellants' interests and they fully assumed that role. The *Amici* generated an adversarial tone during the confidential proceedings through their active

involvement, which was exactly what former Chief Justice McLachlin sought in such extraordinary closed sessions, as detailed in *Charkaoui I*:

> [50] There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence. The designated judge under the IRPA does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged — perhaps unknowingly — to make the required decision based on only part of the relevant evidence. As Hugessen J. has noted, the adversarial system provides "the real warranty that the outcome of what we do is going to be fair and just" (p. 385); without it, the judge may feel "a little bit like a fig leaf" (Proceedings of the March 2002 Conference, at p. 386).

[213] When advocating for the Appellants' interests, the *Amici* could have petitioned the Court to hear a witness or call an expert witness if needed. I would have heard both the *Amici* and the Attorney General's counsel if such a request had been made. The main difference with the IRPA certificate proceedings is that in instances involving *Amici*, leave from the Court would be required. In such instances, having a judge act as the gatekeeper to the proceedings may be in the best interests of justice.

[214] I note in passing that dealing with special advocates can be challenging, as I have learned from my experience in certificate proceedings where special advocates were appointed. Indeed, the functions, responsibilities, and power of the special advocates are fixed, with little room for

manoeuvring. It is informative to know that special advocates with no restrictions on resources can present a slew of motions that can be time-consuming and sometimes ineffective (for more on this see *Brar 2020* at paras 172-179, in particular para 176).

[215] For the reasons enumerated above, I believe that my role in these appeals can only reflect that I served in an impartial and independent capacity.

(6) Disclosure

[216] It is worth repeating that full disclosure is not an absolute right. The protection of national security information can legitimately limit the scope of disclosure of what would be revealed to a person involved in such proceedings under normal circumstances, as discussed at paragraph 6 of these reasons.

[217] The Public Order and Reasons issued in each appeal (*Brar 2021* and *Dulai 2021*) explain why national security material had to be protected in both cases without disclosing anything prejudicial to national security or the safety of any person. At paragraph 90 of the *Brar 2021* decision, I included a summary of the allegations that became publicly known to both Appellants. Mr. Brar's case had 16 allegations, whereas Mr. Dulai's had ten. The summaries cross-referenced each allegation to the appealed decisions. A Revised Appeal Book was also issued for each file, including the new disclosure that resulted from lifts of redactions or information summaries. The work done in the *ex parte* and *in camera* hearings led to the disclosure of additional substantial information.

[218] Even though there was limited disclosure at the time, the submissions made by each of the Appellants in response to the two-page summaries submitted by the Minister in the administrative review proceedings are equally revelatory with respect to their knowledge of the case against them (see Revised Appeal Books at pp 118-136 (Brar) and pp 157-180 (Dulai)).

[219] As the judge having heard all of the evidence, I am confident that most of the allegations, as well as most of the evidence, have ultimately been disclosed to the Appellants. Nevertheless, in each case, some of the specific allegations have not been made public, and some, but not all, of the evidence in support of known allegations also remains unknown to the Appellants.

[220] As is explained in the Reasonableness Decisions, each allegation that has not been disclosed to the Appellants is related to a public allegation in the appeals. Thus, although the Appellants may not be aware of the specificity of the undisclosed allegations, they are aware of the essence of those allegations as reflected in the public allegations. As a result, they have been able to provide the necessary guidance to their counsel and the *Amici*.

[221] Indeed, the *Amici*, who were appointed by the undersigned to represent the Appellants' interests, were aware of the unknown claims and evidence, and they challenged all of them. They presented factual and legal submissions that addressed opposing viewpoints to the Attorney General's counsel. The IRPA's special advocate mechanism could not have done more in the current appeals' unique circumstances because a special advocate could not have retrieved more from the protected national security material. As a result, I find that the *Amici* mandated to represent the Appellants' interests were meaningful and substantial substitutes for absolute

disclosure for the purposes of a SATA appeal, just as the special advocates were found to be a meaningful and substantial substitute for adherence to the principles of fundamental justice in the IRPA proceedings.

[222] The Appellants' submissions were comprehensive, extensive, and well documented, and I can infer from everything that has been disclosed in both appeals that the Appellants have a sufficient understanding of the case to which they have to respond.

[223] The SATA protections ensure that persons on the SATA list have a meaningful opportunity to be heard, but not to the point of disclosing information that might jeopardize national security. There is a delicate balancing act between an acceptable judicial system that ensures air transportation safety and providing a fair recourse to impacted citizens. I believe that this balancing act has been achieved in the circumstances.

[224] On this, I add the following: in order to make the SATA appeal provisions more consistent in its application and ensure procedural fairness when responding to the particulars of these appeals, the appointment of *amicus curiae* or an equivalent should be legislated and not left to a designated judge's discretion. The appointment should be automatic, with a mandate to represent the appellant's interests, similar to the role given to the *Amici* in the two current proceedings. Leaving it up to the presiding judge's discretion without changing the legislation could potentially open the door to unfair appeal processes.

(7) The decision has to be made on the facts and law

[225] As can be seen from the foregoing, I consider that I have all of the facts necessary to make a decision on the reasonableness of the Minister's decisions in both appeals. I was privy to all of the public, *ex parte* and *in camera* evidence, heard witnesses in both forums, saw and heard the Minister's counsel's and Appellants' submissions in public and confidential hearings, and saw and heard the *Amici'*s challenge the Minister's evidence and their confidential submissions. I also have all legal arguments on the law and constitutional issues, having received public comments from the Minister's and public counsel, as well as confidential submissions from the Attorney General and the *Amici*. The Reasonableness Decisions and the confidential reasons that complement them, including the present decision, are the result of this process.

D. *Conclusion on section 7 analysis*

[226] Given my finding that the SATA's administrative review and appeal procedure available to listed individuals are fair processes that comply with the principles of natural justice when considering relevant factors (*Charkaoui I* at para 21), it is not necessary to go through a section 1 analysis.

[227] The Appellants also made other arguments, which have largely been addressed in the present reasons. As they tackle some of the same issues highlighted in this judgment but in more detail, the Reasonableness Decisions should also be consulted (see section entitled "*Legal principles related to the disclosure of national security information in judicial civil and administrative proceedings*" in both Reasonableness Decisions at p 49 (Brar) and p 48 (Dulai).

[228] The constitutional question is answered in the following way:

> Do sections 15 and 16 of the SATA violate the Appellants' rights to section 7 of the *Charter*, specifically their rights to liberty and security of the person, because they permit the Minister, and the Court, to determine the reasonableness of the Appellants' designation as listed persons, and the reasonableness of the Minister's decision based on information that is not disclosed to the Appellants and in relation to which they have no opportunity to respond?
>
> If so, is the violation of the Appellants' section 7 rights justified by section 1 of the *Charter*?

[229] The answer is that although the SATA deprives the Appellants' of their right to the security of the person, this violation is done in accordance with the principles of fundamental justice. Indeed, the SATA and the inclusion of *Amici* provided a substantial substitute to ensure a fair process. As a result, no section 1 analysis is required.

X. Overall conclusions on sections 6 and 7 of the *Charter*

[230] In the current decision I considered whether sections 8 and 9 (1)(a) of the SATA, as well as sections 15 and 16, infringed on the Appellants' constitutional rights, specifically sections 6 and 7 of the *Charter*. Ultimately, I determined that both the international mobility right (paragraph 6 (1)(a)) and the national mobility right (paragraph 6 (2)(b)) had been violated, but that these violations were justified under section 1 of the *Charter*. I also found that the section 7 *Charter* security right was engaged, but that the deprivation of security complied with the principles of natural justice given the SATA's administrative review and appeal process which included, among other things, a substantial substitute for full disclosure and a fair process. As a result, a section 1 analysis was not required.

[231] Infringements to section 6 of the *Charter* in this case were the results of two main causes. First, the Appellants would have great difficulty leaving the continent because they are unable to travel by air, which restricts their freedom "to leave" under subsection 6(1) of the *Charter*. Second, since I deemed travelling by air within Canada for personal or business purposes to be a necessity rather than a privilege for a Canadian citizen, the Appellants' possibility to work is restricted by their inability to rely on air transportation because of their status as listed persons. The ability to seek a living in any province is a constitutional right under paragraph 6(2)(b) of the *Charter*, and any restriction to it constitutes a breach.

[232] The section 1 analysis showed that the violations were justified and necessary to safeguard national security and the security of any person. Indeed, the analysis concluded that the SATA's limitations were properly defined, unambiguous, and legally mandated in order to achieve national security purposes.

[233] Furthermore, the SATA's objective of ensuring Canadians' air safety, and providing a fair procedure for listed individuals who want to make submissions or appeal a decision was clearly stated, pressing, and substantial. A correlation was established between the purpose of air transportation security, terrorist acts, and the limits that are in place through the SATA. The legislation aims to protect air travel against terrorist threats, and one method of doing so is to restrict international mobility. To this effect, prohibiting air travel is the only infallible way to prevent a terrorist attack on a plane or the facilitation of such an act, whether in Canada or abroad. Consequently, the SATA is rationally connected to its objective.

[234] The SATA's safety goal is causally linked to a breach of the national mobility right, and as a result, the mechanisms used to reach this objective are proportional. As long as a person is suspected of posing a threat to Canadian air travel, the decision to prevent them from travelling domestically by air can be justified. This is also true of an individual suspected of flying from Canada to an international destination in order to commit a terrorist act in violation of Canadian law.

[235] When it comes to infringing international and national mobility rights, the SATA scheme only does so to the extent that it is reasonably necessary to achieve the purpose of air transport safety. Limiting mobility rights is the best way to ensure safety in air transportation, as long as suitable recourses are available to dispute the claims levelled against the named individuals. Essentially, the safety of air transportation from terrorist acts and Canadians' trust in air travel trump any difficulties caused by the violation of the Appellants' mobility rights, whether for foreign travel or to earn a living within Canada. Therefore, the section 6 constitutional challenge is dismissed.

[236] While the limits imposed by the SATA on the Appellants' section 7 *Charter* security right were in accordance with the principles of fundamental justice and therefore there was no need to conduct a section 1 analysis, I nevertheless recognized that having one's name on the no-fly list has an impact on their right to security of the person.

[237] In view of this fact and because the individuals' security rights in these instances were determined to be partially violated, it was necessary to ensure that the SATA's impact on these

interests was consistent with the principles of fundamental justice. As a result, I had to ensure that the SATA's administrative review and appeal procedures gave the Appellants a fair chance to defend themselves against the allegations, despite the fact that national security intelligence prevented them from seeing the entire record and from attending all hearings in person.

[238] For this purpose, I completed a thorough examination of the role of the designated judge and of the *Amici*. It reaffirmed that the designated judge in a SATA appeal has a larger gatekeeper role to play given the national security angle. It was also a reminder that, based on *Charkaoui I*, the designated judge is the only person capable of supplying the important judicial component of the procedure and must play an active and non-deferential role to ensure that his independence and impartiality are not jeopardized by seeming too deferential to the Government's position. The designated judge's active interventionist role and enhanced ability to skeptically evaluate and vet material demonstrates that he or she can make choices based on the facts and the law.

[239] As for the *Amici*, they saw their mandate expanded in July 2020 to include the representation of the Appellants' interests during *ex parte* and *in camera* hearings. I also made sure that all the conversations the *Amici* had with the Appellants would be protected by solicitor-client privilege and compelled them to act as cross-examiners under the new mandate, which they faithfully did. This allows us to conclude that the *Amici*'s mandate and role in these cases were a meaningful substitute to ensure compliance with principles of natural justice.

[240] Lastly, owing to summaries of allegations that were made available to the Appellants and in which they accessed some of the supporting evidence, they knew the essence of the case against them and were given a fair chance to respond to it and give adequate directions to their counsel.

[241] In light of this, the constitutional challenge raised by section 7 of the *Charter* is also dismissed.

XI. A few last words

[242] These appeals have been ongoing for a little over three years (April 2019). According to subsection 16(4) of the SATA, such appeals must be resolved "without delay." While appeals under the SATA are complex and the legislation requires specific procedures such as confidential and public hearings, I do not believe that three years can be qualified as being "without delay". Considering the COVID-19 pandemic, however, that began in March 2020, this timeline was the best we could do under the circumstances.

[243] In my opening remarks at the public hearings in Vancouver in April 2022, I went into great detail about the various steps we underwent. I think that future appeals that are filed in a timely manner (assuming that day ever comes) can be resolved in 10 to 14 months. The parties, counsel and the designated judge must prioritize such proceedings in order to accomplish that.

[244] Finally, I would like to express my gratitude to everyone involved in these proceedings. In action, you were professionals. Notably, a sincere appreciation to the personnel at the Federal

Court's Designated Proceedings Section, without whose assistance it would have been challenging to complete our work.

JUDGMENT in T-669-19 and T-670-19

THIS COURT'S JUDGMENT is that:

Question 1:

> Do sections 8 and 9(1)(a) of the *Secure Air Travel Act*, SC 2015, c 20, s 11 [SATA] infringe on the Appellants' mobility rights pursuant to section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]?

Answer:

Those provisions alone do not infringe the Appellants' mobility rights, but the SATA scheme does.

Question 2:

> Can this infringement be justified under section 1 of the *Charter*?

Answer:

Yes. I note that had I conducted an analysis pursuant to the *Doré* framework, as suggested by the Minister's counsel, my above reasoning would apply to find that the restriction imposed on Mr. Dulai's mobility rights by the Minister's decision was reasonable.

Question 3:

> Do sections 15 and 16 of the SATA violate the Appellants' rights to section 7 of the *Charter*; specifically, their rights to liberty and security of the person because they permit the Minister and the Court to determine the reasonableness of the Appellants' designation as listed persons and the reasonableness of the Minister's decision based on information that is not disclosed to the Appellants and in relation to which they have no opportunity to respond?

Answer:

The Appellants' section 7 *Charter* security rights have been violated but a substantial substitute was found to ensure that the appeal process was fair.

No costs are awarded.

"Simon Noël"
Judge

Annex A

Procedural history covering both Appeals (Mr. Brar and Mr. Dulai)

[1] Following the filing of the Notices of Appeal from Mr. Brar and Mr. Dulai, this Court ordered the Respondent to serve and file a public Appeal Book for each appeal, the contents of which were agreed upon by the parties. These Appeal Books contained numerous redactions made by the Respondent in order to protect the confidentiality of information or evidence it believed would be injurious to national security or endanger the safety of any person if disclosed.

[2] Subsequently, this Court ordered on October 7, 2019, that the Respondent file with the Designated Registry of this Court an unredacted Appeal Book for each appeal, containing and clearly identifying the information that the Respondent asserts could be injurious to national security or endanger the safety of any person if disclosed. The Court also ordered that the Respondent file classified affidavits with the Designated Registry explaining the grounds for the redactions as well as file and serve public affidavits explaining the nature of the redactions in a manner that does not injure national security or endanger the safety of any person. During the process of preparing the unredacted classified Appeal Books and the affidavits, a number of redactions were lifted by the Respondent, resulting in further disclosure to the Appellants.

[3] The Respondent also advised the Court and the parties that, pursuant to paragraph 16(6)(g) of the SATA, it was withdrawing certain classified information from the Appeal Book in response to Mr. Dulai's statutory appeal. The Court accepted that the legislation provides for the withdrawal of information and issued an Order authorizing the withdrawal of the information and the replacement of the relevant pages in the classified unredacted Appeal Book. However,

the Court also ordered that, as a superior court of record, it would keep three copies of the Appeal Book containing the withdrawn information under seal in a separate location at the Designated Registry, at least until the issue of the withdrawn information retention had been dealt with.

[4] In response to the inclusion of redacted information in the Appeal Books, the Court appointed two *Amici* in an Order dated October 7, 2019. The Court originally ordered that the *Amici* be given access to the confidential information as of December 9, 2019, following which they would not be permitted to engage in two-way communication with the Appellants and their counsel, except with leave from the Court. At the request of the *Amici*, this was extended to January 20, 2020, in order to allow for more effective and meaningful communication with the Appellants in light of the redactions lifted by the Respondent.

[5] On January 16, 2020, an *ex parte* and *in camera* case management conference was held to discuss the next steps concerning the confidential information in this case. A public summary of the case management conference was provided to the Appellants shortly thereafter. During this case management conference, the Respondent and the *Amici* raised numerous legal issues regarding the withdrawn information (in Mr. Dulai's case only), the role of the *Amici* in these appeals, the bifurcation of the appeals process between the "disclosure phase" and the "merits phase," and the role of the designated judge. The Court proposed that the *Amici* and the Respondent meet to discuss the issues raised and correspond with the Court concerning the preliminary legal issues to be adjudicated before moving further in the appeals.

[6] Notwithstanding the Respondent's position that the Court should address, on a preliminary basis, the applicable standard of review in these appeals, which the Court found to be premature at this stage, a list of preliminary legal issues was agreed upon by the Appellants, the Respondent, and the *Amici* during a case management conference held on February 13, 2020. This list of preliminary questions was subsequently endorsed by the Court via its Order dated February 18, 2020.

[7] On April 16, 2020, a public hearing via teleconference was held where the parties and the *Amici* made oral submissions on these legal questions.

[8] On June 20, 2020, this Court issued detailed Reasons in *Brar v Canada* (Public Safety and Emergency Preparedness), 2020 FC 729 [*Brar 2020*] answering the preliminary legal questions in these appeals. These Reasons addressed the role of the designated judge in appeals under the SATA, the role and powers of the *Amici* in these appeals, the procedure applicable to the withdrawal of information by the Minister under the SATA, and the possibility and purpose of *ex parte* and *in camera* hearings on the merits under the SATA. For more information on the facts up to the issuance of these Reasons, see paragraphs 22 to 28 in *Brar 2020*.

[9] On July 15, 2020, a public case management conference was held to discuss the next steps in the appeals.

[10] On July 17, 2020, an Order was issued to replace the Order dated October 7, 2019, appointing the *Amici* to better reflect the Court's Reasons dated June 30, 2020, and set out the next steps in the appeals.

[11] On September 10, 2020, the Respondent filed a replacement *ex parte* affidavit for the CSIS affiant due to the unavailability of the previous affiant. Additionally, in light of the Reasons in *Brar 2020*, counsel for the Attorney General filed a supplemental *ex parte* affidavit from the same affiant on September 25, 2020.

[12] On September 22, 2020, an *ex parte* and *in camera* case management conference was held to discuss the progress of the appeals. A public summary of the discussion that took place was communicated to the Appellants in Public Communication No. 5.

[13] On October 5, 2020, an *ex parte* and *in camera* hearing was held. The AG's counsel and the *Amici* presented their agreed-upon lifts and summaries of redacted information to the Court in preparation for the upcoming *ex parte* and *in camera* hearing on the disputed redactions. This Court approved the proposed lifts and summaries. On October 7, 2020, a public summary of the hearing was issued to the Appellants in Public Communication No. 6.

[14] The *ex parte* and *in camera* examination and cross-examination of the AG's witnesses in Mr. Brar's appeal took place over six days on October 14, 15, 16, 19, 20 and 22, 2020. The AG's counsel presented evidence on the injury to national security of disclosing the contested redactions and summaries proposed by the *Amici*, as well as the reliability and credibility of the

redacted information. The *Amici* questioned the justifications for the redactions and the summaries proposed by the AG's counsel, and questioned the affiants with documentary evidence. On November 3, 2020, a public summary of the hearings was communicated to the Appellants in Public Communication No. 7, which summarizes the hearings as follows:

> October 14, 2020
>
> Court began at 10:00 a.m. on October 14, 2020. The Minister called a CSIS witness who filed two (2) classified affidavits in these proceedings, one (1) on September 10, 2020, and another on September 25, 2020. The first affidavit relates primarily to the injury to national security of disclosing the redacted information and the supplementary affidavit relates primarily to the reliability and credibility of the redacted information.
>
> The witness gave evidence on various points, including:
>
> - aspects of CSIS' operations that are relevant to SATA and the PPP;
> - CSIS policies and procedures relating to the PPP including policies and procedures in relation to preparing, reviewing and updating case briefs;
> - the Khalistani extremism threat in Canada;
> - the reasons for Mr. Brar's nomination in exigent circumstances;
> - subsequent instances where Mr. Brar's case brief was reviewed and/or revised, and Mr. Brar was relisted, including reasons for changes to Mr. Brar's case brief;
> - the harm to national security that would result if each contested redaction and summary was disclosed; and
> - the reliability and credibility of the redacted information, including the origin of some of this information and how it was assessed by the Service.
>
> October 15, 2020
>
> Court resumed in the morning of October 15, 2020, at 9:30 a.m. and the AG's counsel completed its examination of the CSIS

witness late in the morning. Immediately after the examination in chief, the *Amici* commenced their cross-examination of the CSIS witness, which continued for the remainder of the day. The cross-examination on this day included questions on a variety of topics, including CSIS' policies, procedures and practices in respect of the PPP and the reliability and credibility of the redacted information.

During the cross-examination, the AG's counsel reminded the Court and the *Amici* that public counsel for the appellant would play an important role, and objected that the *Amici's* role should not be to duplicate that of public counsel. The Court endorsed those comments, and so directed the *Amici*. The *Amici* filed a number of exhibits on various topics.

October 16, 2020

The *Amici* continued to cross-examine the CSIS witness for part of the morning on October 16, 2020, at 9:30 a.m., after which Court was adjourned until Monday.

October 19, 2020

Court resumed the morning of October 19, 2020, at 9:30 a.m., and the *Amici* continued their cross-examination of the CSIS witness for the remainder of the day. The cross-examination continued to address the reliability and credibility of the redacted information.

October 20, 2020

The cross-examination of the CSIS witness continued for the morning of October 20, 2020. Among other things, the questions focused on the injury to national security of releasing certain information or summaries. After lunch, the AG's counsel conducted its re-direct of the CSIS affiant, which was concluded mid-afternoon.

October 22, 2020

Court commenced at 9:30 a.m. on October 22, 2020, and the Minister called a witness from Public Safety Canada. The Public Safety witness gave evidence on various points, including:

- the PPP, the PPAG and the PPIO;
- the documents that were prepared in relation to Mr. Brar's listing; and

- injury to national security that would result from releasing certain information.

The *Amici* completed its cross-examination of the Public Safety affiant mid-afternoon on that same day, which focused on the PPP, the Passenger Protect Advisory Group, the Passenger Protect Inquiries Office and the documents relating to Mr. Brar's listing.

[15] The *ex parte* and *in camera* examination and cross-examination of the Minister's witnesses in Mr. Dulai's matter was held on November 16, 17 and 23, 2020. At the outset of the hearing, the AG's counsel and the *Amici* consented to an Order that would render the evidentiary record resulting from the Brar and Dulai hearings subject to any arguments in relation to the weight, relevancy and admissibility of the evidence. The AG's counsel and the *Amici* agreed to an Order at the beginning of the hearing that would make the evidentiary record resulting from the Brar and Dulai hearings subject to any arguments over the weight, relevancy and admissibility of the evidence. This allowed for efficiencies in the Dulai examinations and cross-examinations. On December 2, 2020, a public summary of the hearings was communicated to the Appellants in Public Communication No. 8, which summarizes the hearings as follows:

November 16, 2020

Court began at 9:45 a.m. on November 16, 2020. The AG's counsel commenced by filing four (4) charts, namely (i) a classified chart listing all of the contested redactions and contested summaries, (ii) a classified chart itemizing the proposed uncontested redactions, uncontested summaries and lifts agreed to by the AG, (iii) a classified chart containing only the CSIS contested redactions and summaries organized in a way to guide the examination of the CSIS witness; and (iv) a classified chart listing excerpts from the transcript of the Brar hearings that apply to the present hearings.

The Minister called the same CSIS witness that it called in the Brar appeal. This witness filed two (2) classified affidavits in these proceedings, one (1) on September 10, 2020, and another on September 25, 2020. The first affidavit relates primarily to the

injury to national security of disclosing the redacted information and the supplementary affidavit relates primarily to the reliability and credibility of the redacted information.

Because of the Evidentiary Order, the examination and cross-examination of the CSIS witness in the present appeal was shorter than it was in Brar. That said, the witness gave evidence on various points including:

- the threat posed by Khalistani extremism;
- the reasons for Mr. Dulai's nomination in exigent circumstances;
- subsequent occasions where Mr. Dulai's case brief was reviewed and/or revised, and Mr. Dulai was relisted, including reasons for changes to Mr. Dulai's case brief;
- the harm to national security that would result if each contested redaction and summary was disclosed; and
- the reliability and credibility of the redacted information, including the origin of some of this information and how it was assessed by the Service.

The AG's counsel completed its examination of the CSIS witness mid-day, after which the *Amici* commenced their cross-examination of the CSIS witness for the remainder of the day. The cross-examination on this day focused on the reliability and credibility of the redacted information, while also exploring the process by which Mr. Dulai was nominated for and has been maintained on the SATA list.

November 17, 2020

Court resumed in the morning of November 17, 2020, at 9:30 a.m. The *Amici* continued to cross-examine the CSIS witness, and questions focused on the reliability and credibility of the redacted information and the injury to national security of releasing certain information or summaries. The *Amici* filed a number of exhibits on various topics. The cross-examination was complete near the end of the day, after which the AG's counsel conducted a brief re-direct of the CSIS witness.

November 23, 2020

> Court resumed at 10:00 a.m. on November 23, 2020. The Minister called a witness from Public Safety Canada. This witness also testified in the Brar appeal. Because of the Evidentiary Order, the examination and cross-examination of the Public Safety witness in the present appeal was shorter than it was in Brar.
>
> The AG's counsel conducted its direct examination for the first half of the morning, which focused primarily on the documents that were prepared in relation to Mr. Dulai's listing.
> The *Amici* completed its cross-examination of the Public Safety affiant by the lunch break, which focused on the documents relating to Mr. Dulai's listing and the process by which individuals are placed on the SATA list.

[16] On December 16, 2020, a public case management conference was held with all counsel to update the Appellants on the next steps in the appeals. In addition, the AG's counsel filed an *ex parte* motion record to strike certain evidence resulting from the *ex parte* and *in camera* hearings from the record.

[17] Following the *ex parte* and *in camera* hearings, on January 8, 2021, the AG's counsel and the *Amici* filed confidential submissions concerning the redactions.

[18] On January 14, 2021, the Court issued Public Communication No. 9 to inform the Appellants on the progress of the appeals in light of the COVID-19 situation and, more specifically, the recent orders enacted by the provinces of Quebec and Ontario relating to the pandemic. The AG's counsel and the *Amici* then informed the Court that they were of the view that in-person hearings in these matters should be postponed until the stay-at-home order was lifted.

[19] On February 4, 2021, an *ex parte* case management conference was held in the presence of the AG's counsel and the *Amici* to discuss the status of the appeals. I also raised a question of law, namely whether the principles set out by the SCC in *Harkat* in relation to the requirement to provide the Appellant(s) summaries or information that would permit them to know the Minister's case, applied to the SATA appeal scheme. I requested comments and further submissions from the AG's counsel and the *Amici*.

[20] On February 5, 2021, a public summary of the discussion was communicated to the Appellants in Public Communication No. 10.

[21] On February 9, 2021, counsel for the Appellants requested permission to provide the Court with submissions respecting the above question of law. The Court granted leave. Counsel for the Appellants, the AG's counsel and the *Amici* filed their written representations on February 19, 2021. The AG's counsel filed their reply on February 24, 2021.

[22] On February 24, 2021, the *Amici* filed *ex parte* written representations concerning the AG's counsel's motion to strike certain evidence from the record.

[23] On March 3, 2021, an *ex parte* case management conference was held in the presence of the AG's counsel and the *Amici* to discuss the possible adjournment of the *ex parte* and *in camera* hearing scheduled for March 4, 2021. A public communication was issued to all parties to explain that the Court proposed, and the AG's counsel and the *Amici* agreed, to adjourn the hearing scheduled for the next day due to COVID-19 related reasons and schedule an *ex parte*

and *in camera* case management conference on March 9, 2021, to discuss the specific legal issues for which the Court was seeking to receive submissions.

[24] *Ex parte* and *in camera* hearings were held on June 16 and June 17, 2021. The purpose of the hearings was for AG's counsel and the *Amici* to make submissions on disclosure, the reasonably informed threshold, and the AG's motion to strike. On July 21, 2021, a public summary of the hearings was communicated to the Appellants in Public Communication No. 11 which can be found below:

> June 16, 2021
>
> Court commenced at 9:30 a.m. on June 16, 2021, and submissions were made by the AG's counsel and the *Amici* on disclosure and the requirement to reasonably inform the appellants.
>
> AG Submissions on Disclosure and Reasonably Informed
>
> The AG's counsel filed the following documents at the commencement of the proceedings:
>
> - an updated chart for each file containing the contested claims and summaries;
> - an updated chart for each file containing the summaries and redactions agreed to by the AG's counsel and the *Amici*;
> - an updated chart for each file containing the lifts made by the AG;
> - a chart for each file listing all of the allegations against the appellants that have been disclosed, partially disclosed or summarized, and withheld; and
> - a copy of the Recourse Decision in each file reflecting the agreed-upon summaries and redactions and the lifts made by the AG.
>
> The AG's counsel made submissions on the applicable test for disclosure in appeals under section 16 of the SATA. The AG's counsel argued that if disclosure of information would result in

injury to national security or endanger the safety of any person, it should not be disclosed. Additionally, it argued that SATA does not authorize the Court to balance different interests that could be at play when assessing disclosure, including whether or not the appellant is reasonably informed. The AG's counsel then went through the chart containing the contested claims and summaries to highlight why lifting or summarizing these claims would result in injury to national security.

The AG's counsel then made submissions on the reasonably informed threshold and argued that at this point in time, the appellants are reasonably informed. The AG's counsel highlighted that the scheme allows for some information to not be disclosed or summarized, and that the assessment of whether or not the appellants are reasonably informed is fact specific and should be made throughout the appeals. The AG's counsel stressed that the threshold under subsection 8(1) of SATA, namely "reasonable grounds to suspect," must inform the Court's consideration of whether or not the appellants are reasonably informed.

Amici's Submissions on Disclosure and Irreconcilable Tension

The *Amici* made submissions on two issues.

First, the *Amici* argued that the decision of the SCC in *Harkat* requires (in circumstances where redacted information or evidence cannot be lifted or summarized without national security injury, such information comes within the incompressible minimum amount of disclosure that the appellant must receive in order to know and meet the case against him), that the Minister withdraw the information or evidence whose non-disclosure prevents the appellant from being reasonably informed: *Harkat* para 59. The *Amici* argued that this situation, described in *Harkat* as an irreconcilable tension, arises in both the Brar appeal and the Dulai appeal. The *Amici* further argued that given the Minister's disagreement with the *Amici* that irreconcilable tensions arise in these appeals, he will not withdraw evidence of his own motion. The Court must therefore decide whether or not the appeals involve irreconcilable tensions.

To that end, the *Amici* proposed a form of order the Court should make if it agrees with the *Amici* that either or both of the appeals involve situations of irreconcilable tension. The order would identify the specific information or evidence that gives rise to the irreconcilable tension and declare that the Minister must withdraw that information or evidence within a fixed period (the *Amici* proposed 60 days), failing which the Court will be unable to

determine the reasonableness of the appellant's listing and must allow the appeal.

Second, the *Amici* reviewed the contested claims and summaries in each appeal. In some instances, the *Amici* argued that the AG's redactions were not necessary (because the information or evidence was not injurious). In other cases, the *Amici* agreed that disclosure would be injurious but proposed a summary that would avert the injury while allowing the appellant to be reasonably informed of the case he must meet. In other cases still, the *Amici* argued that the information or evidence could not be lifted or summarized without injury, but had to be disclosed for the appellant to be reasonably informed. In these latter cases, the *Amici* asked the court to make the declaration of irreconcilable tension described above.

The *Amici* emphasized that the applicable standard is that of a "serious risk of injury," and that the judge must ensure throughout the proceeding that the Minister does not cast too wide a net with his claims of confidentiality.

Other Issues

The parties discussed other procedural issues, including the format and timing for filing a revised appeal book following the Court's decision on disclosure, a timeline for appealing this decision and staying the order if an appeal is filed, and potential redactions to the list of exhibits.

June 17, 2021

The hearing resumed at 9:30 a.m. on June 17, 2021, and the Court heard arguments from both the AG's counsel and the *Amici* on the AG's motion to strike. The AG withdrew its motion to strike following the mid-day break.

In the afternoon, the Court discussed with the *Amici* and AG's counsel the possibility of preparing a further summary of the evidence in the *ex parte* and *in camera* hearings, to expand on the summaries provided in Public Communication No.7 (T-669-19) and Public Communication No. 8 (T-670-19) in a way that would not be injurious to national security. The AG's counsel and the *Amici* agreed to prepare a draft summary in this regard.

The Court asked that this summary include confirmation that there is no information or evidence against either Appellant in relation to

> 8(1)(a) of SATA, and that both listings concern information and evidence in respect of 8(1)(b).

[25] The issues related to the redacted list of exhibits and disclosure of additional information through summaries were a constant endeavour after the June 2021 hearing. The Appellants were informed of this through Public Communication No. 12. Concerning the list of exhibits, it was later agreed that it would be released in a redacted format once the AG's counsel and the *Amici* had reviewed the determinations made on the redactions at issue as a result of the *ex parte* and *in camera* hearings. As for the summary of additional information, counsel for both the Appellants and Respondent undertook to submit it no later than August 31, 2021. As soon as it was submitted, reviewed, and then agreed upon by the undersigned, it was released as Public Communication No. 13 on August 31, 2021, after an *ex parte* and *in camera* hearing was held the same day.

[26] From then on, all outstanding matters were taken under reserve with the objective of issuing an Order and Reasons as soon as possible, which was done on October 5, 2021, and resulted in two Orders (*Brar 2021* and *Dulai 2021*). The issuance of orders was announced in Public Communication No. 16.

[27] On October 12, 2021, a Revised Appeal Book was filed and made available to all parties. This resulted in a broader scope of disclosure and more information was revealed to the Appellants.

[28] On November 1, 2021, a case management teleconference was held to discuss all outstanding matters, including the opportunity to be heard for both the Appellants and the Minister pursuant to paragraph 16(6)(d) of the SATA. Then, on December 1, 2021, the Court issued an order regarding the timing for the filing of affidavits and submissions, and the scheduling of hearings planned for 2022.

[29] On December 7, 2021, and at the request of the presiding judge, an *ex parte* and *in camera* case management conference was held to discuss next steps and other scheduling matters. The Court requested additional *ex parte* and *in camera* submissions to be filed in respect of the classified and public evidence on the record that support the allegations in each appeal. A schedule was established and the Court set a few days aside in May 2022 to hold an *ex parte* and *in camera* hearing following the public hearings, if deemed necessary. This information was confirmed in Public Communication No. 17, issued on December 8, 2021.

[30] On January 31, 2022, the Court received further affidavits from Mr. Dulai including personal material that, in the view of his counsel, could jeopardize Mr. Dulai's safety or security if made public. As a result, in a letter dated January 31, 2022, his counsel requested the option to file a "public" version of the affidavit in which sensitive information would be redacted.

[31] On February 2, 2022, the AG's counsel filed their written and confidential submissions.

[32] The Court issued an oral direction on February 7, 2022, in response to Mr. Dulai's letter and the AG's counsel's reply of February 4, 2022. The Court stated that it was satisfied with the

parties' agreed-upon proposal for Mr. Dulai to send a list of proposed redactions to the AG's counsel for discussion and parties to reach an agreement.

[33] On February 25, 2022, the *Amici* filed their written and confidential submissions.

[34] On March 1, 2022, the AG's counsel filed their public affidavits for each file (Mr. Brar and Mr. Dulai).

[35] On March 9, 2022, the AG's counsel filed a confidential reply in response to the *Amici*'s confidential submissions.

[36] On March 17, 2022, a public case management teleconference was held to discuss details of planned public hearings in Vancouver.

[37] On March 21, 2022, both Appellants filed their written representations related to the allegations against them.

[38] On March 23, 2022, the AG's counsel submitted a letter in response to the case management conference and Public Communication No. 11 confirming that both listings (Mr. Brar and Mr. Dulai) were based on paragraph 8(1)(b) of the SATA and not paragraph 8(1)(a).

[39] On April 5, 2022, the AG's counsel filed classified submissions pinpointing the classified evidence, if any, on which it relies in support of each of the public allegations against the Appellants found in the October 5, 2021, Amended Public Order and Reasons.

[40] On April 11, 2022, Counsel for the Minister filed their public submissions.

[41] On April 14, 2022, the *Amici* filed classified responding submissions to the AG's counsel's classified submissions.

[42] Public hearings took place over four days (April 19-22, 2022) in Vancouver, British Columbia. Both Mr. Brar and Mr. Dulai were present and testified, in addition to Ms. Lesley Soper from the Department of Public Safety Canada. Counsel for both Appellants and Respondent were present. The two *Amici* were also in attendance. The purpose of these hearings was to provide the Appellants and the Minister with an opportunity to be heard. A summary of the hearings can be found below:

> April 19, 2022
>
> Court commenced at 9:30 a.m. (PT) on April 19, 2022. Both Appellants were present and examined by their respective Counsel. Counsel for the Minister also questioned Mr. Dulai.
>
> The examination consisted of a review of each Appellant's background and questions related to the specific allegations against each one of them.
>
> In both cases, the Appellants answered all the questions and testified on the impact the listing had on them, their families and their businesses.
>
> They both categorically denied being involved in any terrorist-related activities, whether at home or abroad.

April 20, 2022

Court commenced at 9:30 a.m. (PT) on April 20, 2022.

Counsel for the Minister introduced their witness, Ms. Lesley Soper from Public Safety Canada.

Counsel for both Appellants examined Ms. Soper. Several questions regarding her four affidavits were posed focusing on her job and role.

In Mr. Dulai's case, questions were raised about the administrative update and amended direction that occurred in April 2018, media reports and information obtained as a result of alleged mistreatment.

In the case of Mr. Brar, questions were asked about the nature of the advisory group finding, the decision-making process and the nominating agency. Additionally, Counsel for Mr. Brar raised concerns about the credibility and reliability of the sources used to justify the listing of Mr. Brar.

Counsel for Mr. Dulai made submissions on procedural fairness under the common law and section 7 of the *Charter*. Counsel stated that the Minister's delegate violated Mr. Dulai's procedural fairness rights during the administrative recourse process by failing to give him adequate notice of the case to meet before requiring his response, and by failing to provide reasons for his decision to maintain his name on the no-fly list. As a result, Mr. Dulai seeks a declaration from the Court to this effect.

Counsel for Mr. Dulai also submitted that an irreconcilable tension remains between Mr. Dulai's right to an incompressible minimum amount of disclosure and national security concerns at the appeal stage. Counsel explained that certain information cannot be disclosed to Mr. Dulai because of national security concerns. Consequently, Mr. Dulai cannot know the case to meet and defend himself accordingly. Counsel submits that the only remedy for this irreconcilable tension is for the Minister to withdraw the undisclosable information. If this remedy is not granted, the proceedings will remain unfair. This, in turn, will violate natural justice and Mr. Dulai's rights under section 7 of the *Charter*.

Counsel for Mr. Dulai also raised concerns regarding the choice of witness for public hearings. Despite the fact that Ms. Soper did not have any role in Mr. Dulai's listing, she was the witness retained for the hearing while everything related to the CSIS witness

remained out of reach for the Appellant. Consequently, the Appellant cannot be satisfied that alleged foreign interference is not related to Mr. Dulai's listing and cannot be satisfied that the decision was not political. Important rights are at issue when the label of terrorist is involved and this creates a problem.

Counsel for Mr. Dulai said that he feels scared about speaking freely and that he is concerned at the prospect that a country he advocates against [India] is potentially pulling the strings. Mr. Dulai had to put his entire life before this Court in part because he does not have what he needs to respond to the case against him. In these circumstances, Mr. Dulai is owed a high degree of procedural fairness.

April 21, 2022

Court commenced at 9:30 a.m. (PT) on April 20, 2022.

Counsel for Mr. Dulai carried on with their submissions arguing that the case against Mr. Dulai was based to a decisive degree on undisclosed information and that according to *Harkat* at para 59 "the Minister must withdraw the information or evidence whose nondisclosure prevents the named person from being reasonably informed."

His counsel also said that Mr. Dulai was unable to give meaningful direction to his counsel and therefore the *Amici* were not able to represent Mr. Dulai's interests.

Counsel stated that the standard of review in this case was correctness to which the Judge agreed.

Counsel reviewed most of the allegations against Mr. Dulai and provided explanations aimed at casting a doubt on the credibility of sources and/or the authenticity of the intent behind those allegations.

In summary, Mr. Dulai's lawyer feels that the Government of India has him on its radar and is attempting to discredit him because he is a prominent figure who could pose a threat to them.

Counsel for Mr. Brar indicated, at the beginning of their submissions, that they were not pursuing the amended constitutional question of overbreadth, nor the one related to section 6 of the *Charter*. They submitted that if the Court found that Mr. Brar was not provided with the incompressible minimum

disclosure then it needed to ignore the reasonableness of the decision.

Counsel for Mr. Brar argued that section 7 of the *Charter* was engaged in Mr. Brar's case because being labelled as a terrorist engages security of the person. The fact that Mr. Brar was labelled by the Canadian government as a terrorist imposes psychological stress. Mr. Brar feels like he is being followed. The allegations and accusations are criminal ones. Among the highest seriousness in our society today. The mere fact of accusing someone of those crimes, this is what is different from the ordinary stresses of living in a society.

Counsel for Mr. Brar submitted that when section 7 is engaged, and they believe it is, the person must know the case and have the opportunity to meet that case. While Mr. Brar takes no issue with the role of the *Amici* in this case, their participation is only as good as Mr. Brar is receiving enough information to direct both public counsel and the *Amici*. Confidential sources need to be tested to ensure their reliability.

Counsel for Mr. Brar agreed with the standard or review set forward by the Court, i.e., correctness and no deference. However, they disagree with the claim that Mr. Brar received the incompressible minimum disclosure. They submit that the Respondent's written submissions fail to address the new information that is before this Court. If the merit can only be addressed at a *ex parte* and *in camera* meeting than it reinforces the point that Mr. Brar did not received the incompressible minimum disclosure. Counsel states that Public Communication No.13 mentions additional evidence (about credibility and reliability of information) that was added and to which the Appellant is not privy. The concern about why the CSIS' evidence is preferred over that of Mr. Brar remains.

Counsel for Mr. Brar went over the allegations against him and pointed out that the narrative seems to have changed over time with some information that was withdrawn. For example, the allegation related to the training of youths appears in the first two case briefs but is not included in the subsequent one. Eventually, those actions were attributed to Mr. Cheema. The Appellant does not know the sources of these allegations but questions the rationale justifying why some have been withdrawn. Counsel submits that if the sources have been found to be unreliable, then the credibility of other evidence provided by these sources is doubtful.

Counsel for Mr. Brar stated that in and of itself, there is nothing wrong with anti-India activities or being an operational contact for someone, as opposed to what is claimed in the allegations. There are additional factors to consider in Mr. Brar's case, such as the fact that his father may make him a target for the Government of India in addition to his advocacy for social issues in the community. The consulate ban, which was declared in December 2017 and included Mr. Brar's name as a contact, could also play against him.

Lastly, Counsel for Mr. Brar introduced the idea that the timeline of Prime Minister Trudeau's trip to India and the listing of Mr. Brar may be connected, which would indicate foreign interference.

April 22, 2022

Court commenced at 9:30 a.m. (PT) on April 22, 2022.

Counsel for the Minister of Public Safety Canada informed the Court they would be relying on their written submissions and that three aspects would be covered, namely the standard of review, section 7 of the *Charter* and section 6.

They began by saying that neither Appellant had advanced arguments in terms of their liberty interest and that the Minister's position was that section 7 (liberty) was not engaged and had not been interpreted as the right to choose a means of transportation.

When it comes to security of the person, Counsel for the Minister submitted that recent jurisprudence (*Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261) had determined that stand-alone stigma did not engage section 7 of the *Charter*. The Minister is of the opinion that the Appellants' evidence of being saddened, scared and frustrated needs to be looked at from a broader picture and that it is not enough to meet the threshold required to engage section 7.

The Minister's Counsel claims that the Appellants were given the incompressible minimum disclosure during the appeal proceedings. The Appellants have shown they knew the case against them through the precision with which they addressed different issues. Counsel adds that the two *Amici* also acted as substantial substitutes.

The Minister's Counsel argues that the standard of review in these two cases should be reasonableness and not correctness, as agreed with the Court the day prior. Counsel submits that in the SATA

context, a court that receives new information with regards to credibility has to go back to the decision and determine its reasonableness. On a statutory appeal, the court has to use the standard provided. The fact that the judge has more information still requires the court to decide if the decision is still tenable.

Counsel argued that if the decision is reasonable but is not the decision the judge would have made, it is still reasonable, as this is not about a *de novo* determination. Looking at the whole of the record, the question is whether the decision is reasonable and tenable. That is reasonableness.

Counsel for the Minister stated that one did not need to differentiate between paragraph 8(1)(a) or 8(1)(b) in a SATA appeal as the outcome remained the same; being listed. The judge disagreed.

When it comes to section 6 of the *Charter*, Counsel for the Minister argued that subsection 6(2) (interprovincial) was not infringed under the SATA because the law does not create a differential treatment among people. Counsel submitted that the Appellants have the ability to go to other provinces, just not by air. This does not create a differential treatment. The *Charter* does not protect the type of transportation. Moreover, the Appellants have given evidence to the effect that they have been travelling. Although travel time has been longer, they still travelled.

When asked by the Judge if an infringement to section 6 of the *Charter* could be saved under section 1 in this particular case, Counsel for the Minister answered that the required analysis was that of *Doré*, and not section 1 (*Oakes*). Counsel added that every breach of section 6 rights is proportionate and balanced based on national security considerations and that a lack of reasons does not constitute a breach of procedural fairness. The Minister relied on the recommendation as being the reasons.

The AG's counsel was present at the hearing and claimed that the Appellants had been reasonably informed and had received the incompressible minimum disclosure. Counsel went on to say that while Appellants can never know everything, they certainly know enough in light of their submissions and the *Amici*'s. There would not be a need for subsection 16(6) if they knew everything. *Harkat* has to be applied on a case-by-case basis.

The AG's counsel specified that they would argue in *ex parte* submissions that the reasonable grounds to suspect threshold has

> been met. This is based on confidential information but also on some responses the Appellants have given publicly.
>
> For their part, the *Amici* submitted that they had specifically identified undisclosed allegations that do not come with the incompressible minimum. They maintain that there remains allegations to which the Appellants are unable to respond and therefore unable to direct their counsel and the *Amici*. They argue that this Court should make a *Harkat* declaration in respect to specific allegations – this invites the Minister to either find a way to make further disclosure or failing that, withdraw the allegations.

[43] An *ex parte* and *in camera* case management conference was held on April 27, 2022, at the Federal Court in Ottawa. Both *Amici* and AG's counsel were present. The purpose of the case management conference was to discuss different topics in relation to the final steps of the statutory appeals.

[44] Public Communication No. 19 was issued on April 28, 2022. It gave directions following the *ex parte* and *in camera* case management conference held the day before.

[45] On April 29, 2022, Sadaf Kashia, a lawyer from Edelmann & Co. Law Corporation specializing in complex issues concerning U.S. and Canadian immigration, provided submissions about the circumstances in which individuals may be denied admission to the United States and how that informs what may be inferred from Mr. Dulai's denial of admission on May 27, 2017.

[46] On May 6, 2022, the Court issued Public Communication No. 20 stating that it had received the NNSICOP unredacted Report on the Prime Minister's trip to India in February 2018, which would be opened and reviewed only by the judge at that time. Additional

consultation was to be undertaken should the Court have determined that further disclosure was necessary.

[47] On May 16, 2022, the Court issued Public Communication No. 21 stating that it had reviewed the NSICOP Report and that the portions pertinent to the issues relating to the appeals would be made available to the AG's counsel and *Amici* for their comments, if any.

[48] The *Amici* filed written classified submissions on May 18, 2022.

[49] The Minister filed written classified submissions concerning the NSICOP report on May 18, 2022.

[50] Both the *Amici* and the Minister filed written classified reply submissions on May 24, 2022.

[51] On May 25, 2022, the Court issued Public Communication No. 22 stating that it had read the final confidential submissions and replies of the Minister and the *Amici*, and had decided to take both appeals under reserve without any further *ex parte* and *in camera* hearing.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-669-19
STYLE OF CAUSE:	BHAGAT SINGH BRAR v CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)
DOCKET:	T-670-19
STYLE OF CAUSE:	PARVKAR SINGH DULAI v CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 19-22, 2022
JUDGMENT AND REASONS:	NOËL S. J.
DATED:	AUGUST 10, 2022

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